IN THE COURT OF APPEALS OF IOWA

No. 0-821 / 00-0532
Filed February 28, 2001

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CLERK SUPREME COURT

PHILLIP McPHEE,
Appellant,

vs.

EAGLE IRON WORKS and **EMC INSURANCE COMPANIES,**
Appellees.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

A claimant appeals the district court's ruling on his petition for judicial review. **AFFIRMED.**

Steven C. Jayne, Des Moines, for appellant.

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

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

VOGEL, J.

Phillip McPhee appeals the district court's ruling on his petition for judicial review. Because McPhee failed to provide adequate notice to the employer, Eagle Iron Works (Eagle), under Iowa Code section 85.23, we affirm.

Background facts. McPhee was employed by Eagle at the time of the April 13, 1994 occurrence, which McPhee claims caused him to suffer from post-traumatic stress disorder. Two of McPhee's co-workers, Gooch and Cummins, got into a dispute at work. While McPhee was walking to the company parking lot with Cummins, Gooch allegedly attempted to run over both men with his vehicle. McPhee confronted Gooch the next day and they got into a heated argument. All three parties were reprimanded by the supervisor for their participation in the disturbance. McPhee appeared for work as scheduled until May 2, 1994, when he called in sick. The next week, McPhee worked May 9, had an unexcused absence on May 10 and took funeral leave on May 11-13. He worked on May 14 but then did not return until June 1995, over one year later. The only reason provided to the employer for the period of absence was that he was ill and still struggling over the death of his daughter, approximately ten years earlier. When McPhee attempted to return to work in June 1995, his psychotherapist, Paul Danforth, sent a letter to his employer, which stated:

> Please be advised that Mr. McPhee has been a patient here since February 1, 1994. He was progressing nicely until May, 1994 at which time he developed some physical problems and became ill. He again became very anxious with depression. He is now stable and is able to return to work. He was nearly run down by a car in April, 1994, which precipitated a recurrence of Post Traumatic Stress Disorder. This condition is also stable and should not present any difficulty on the job.

Eagle terminated McPhee's employment on June 16, 1995. McPhee notified his employer of this claim on or about July 26, 1995.

An arbitration decision was issued on February 25, 1998, which found the injury arose out of and in the course of employment but that McPhee had failed to provide notice within ninety days of the incident, as required under Iowa Code section 85.23. The Iowa Worker's Compensation Commissioner and the district court reviewed and affirmed this decision. McPhee now appeals.

Scope of review. The Iowa Administrative Procedure Act, Iowa Code section 17A.19, governs our review of agency action. *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 257 (Iowa 1996). Our review is for the correction of errors at law, not de novo. *Henkel Corp. v. Iowa Civil Rights Comm'n*, 471 N.W.2d 806, 809 (Iowa 1991). The commissioner, not the court, weighs the evidence; we are obliged to broadly and liberally apply those findings to uphold rather than defeat the commissioner's decision. *Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 237 (Iowa 1981). On review, the question is not whether the evidence supports a finding different from the commissioner's but whether the evidence supports the findings the commissioner actually made. *Id.* at 238. In other words, the commissioner's findings are binding on appeal unless a contrary result is compelled as a matter of law. *Id.*

Actual knowledge exception. Because McPhee did not file his claim until approximately one year and two months after the incident involving the vehicle, the deputy found Eagle was not properly notified under Iowa Code section 85.23. McPhee alleges Eagle meets the Iowa Code section 85.23 notice

requirement under the exception for actual knowledge by the employer. Iowa Code section 85.23 reads as follows:

> Unless the employer or the employer's representative shall have *actual knowledge* of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed. (emphasis added)

McPhee contends that even though he failed to provide notice within the statutorily mandated time period, Eagle had actual knowledge of the "occurrence of an injury" within ninety days thereof. McPhee argues he reported the incident to the supervisor and Eagle was then free to conduct an investigation into the incident and handle it as it saw fit. Therefore, he contends the employer was put on notice to the fact that McPhee had a potential worker's compensation claim from that incident.

Employees covered under Chapter 85 of the Iowa Code are entitled to compensation for any and all personal injuries that arise out of and in the course of employment. *See* Iowa Code § 85.3(1). Iowa Code section 85.23 notice requires more than the fact that the employer was aware of an employee's illness. *Johnson v. International Paper Co.*, 530 N.W.2d 475, 477 (Iowa Ct. App. 1995). The actual knowledge notice provision requires an employer to have "actual knowledge of the reasonable possibility of an injury" that was work-connected. *Dillinger v. City of Sioux City*, 368 N.W.2d 176, 181 (Iowa 1985).

McPhee cites two cases to address the actual knowledge portion of his argument. We find these cases are distinguished from the case at hand. In

Robinson v. Dep't of Transp., 296 N.W.2d 809 (Iowa 1980)[1], the employee suffered a heart attack on a Saturday while off work and later alleged it was brought on by work-related stress. He claimed the employer had actual knowledge of the injury within ninety days of its occurrence. *Id.* at 810. The employer, however, did not have notice that the injury was work-related and, therefore, the actual knowledge exception had not been met. *Id.*

In *Dillinger*, the employee fell from a ladder, injuring his lower back. *Dillinger*, 368 N.W.2d at 178. At the time of the injury, he filed an incident report with the company, informing them that the injury had occurred. *Id.* Therefore, although the injury did not manifest itself to the point of treatment at that time, the employer had actual knowledge of an injury and the possibility of a claim arising from the incident. *Id.* at 181.

In the case currently before us, the only information provided to Eagle in April of 1994 was the nature of the vehicular incident and that several verbal disputes had taken place. McPhee did not inform Eagle that he had suffered any injury from the incident. Additionally, as he missed work, McPhee did not advise Eagle that his absences were due to being upset from this incident or even that he was seeking psychotherapy regarding the incident. Rather, he repeatedly called in and reported he would not be in to work due to illness or for other reasons. Therefore, under the parameters of the actual knowledge notice requirement as previously defined by our case law, McPhee failed to show Eagle

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[1] This case was overturned on other grounds by *Orr v. Lewis Central School Dist.*, 298 N.W.2d 256 (Iowa 1980).

had actual knowledge of any injury he received from the incident in question or that his illness was work-related until more than one year had passed.

Discovery rule. McPhee next claims the trial court incorrectly applied the discovery rule. Application of the discovery rule in the workers' compensation context means that the statutory limitation period does not begin to run until "'the employee discover[s] or in the exercise of reasonable diligence should ... discover the nature, seriousness and probable compensable character' of his injury or disease." *Gates v. John Deere Ottumwa Works,* 587 N.W.2d 471, 474 (Iowa 1998) (quoting *Ranney v. Parawax Co., Inc.,* 582 N.W.2d 152, 154 (Iowa 1998)). While the discovery rule aids the employee by preventing the limitation period from commencing until the claimant knows of his injury and its probable compensable nature, the notice requirement of Iowa Code section 85.23 protects the employer by insuring it is alerted to a possible claim so that an investigation can be made while the information is fresh. *Id.* at 180. McPhee asserts he was not aware of the nature of his illness or the availability of his claim until Mr. Danforth, his treating psychotherapist, issued the letter to his employer, informing Eagle of the post traumatic stress disorder diagnosis. Thus, he did not discover the nature of his injury until June of 1995 and timely filed his claim within ninety days from the period of his discovery.

It appears from the record, however, that McPhee had knowledge that his illness or distress was work-related prior to the time of his diagnosis being provided to him. He kept an April 19, 1994 therapy appointment after the

incident and spoke with his therapist about almost being struck by the car. He also testified about the symptoms he was experiencing as follows:

> Q. What did you tell them about the reason you were not going to come in to work? A. I told them I was ill.
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> Q. Had you gone to see a doctor or anybody with respect to how you were feeling at that point in time? A. *I was sick to my stomach and nervous, very anxious. I didn't feel it was a physical condition. I mean, it's not like the flu.* If you've got the flu, you know, you're sick. You go to the doctor, get a shot, whatever. I didn't have any idea what this was.
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> Q. Did you feel that anxiousness that you had related to Mr. Gooch working there or the incident with the car or the written warning, or was there - - do you know what was particularly bothering you at that point in time? A. Well, obviously, Mr. Gooch trying to run over two people and the fact that the company didn't do anything to try to straighten it out.
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> * * *
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> Q. [W]hat caused you to stop working there at that point in time. What was it at that point in time that you felt you couldn't continue working? A. At that point in time. I had - - I didn't feel I had to quit working there or whatever. I told you. I became anxious. I'd get sick on the way to work. I tried to go in. For one reason or another, I wasn't making it in.

McPhee did not relate any of these impressions or information to Eagle at the time they occurred. He merely told them he was ill, with no indication he may have been suffering a work-related injury. The trial court stated:

> Substantial evidence in the record supports the finding and ultimate conclusion of the Deputy Commissioner herein that the "Claimant should have recognized the nature, seriousness, and probably compensable character of his injury far earlier than June of 1995 to have given the employer notice of his injury within ninety days after it occurred."

His illness and anxiety when he attempted to go to work combined with his discussion of the incident during his therapy sessions should have alerted him,

even without the specific diagnosis of post traumatic stress disorder, to the fact that his inability to work stemmed from the April 13, 1994 incident. "Under the imputed knowledge prong of the discovery rule, the statute of limitations begins when a claimant gains information sufficient to alert a reasonable person of the need to investigate." *Swartzendruber v. Schimmel,* 613 N.W.2d 646, 650 (Iowa 2000). We agree with the ruling of the trial court affirming the Worker's Compensation Commissioner.

AFFIRMED.