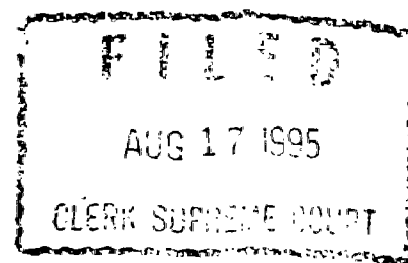


IN THE COURT OF APPEALS OF IOWA

No. 5-162 / 94-0883



CRAIG GARDNER,

Appellant.

vs.

**POURED WALLS OF IOWA, INC.,
and WEST BEND MUTUAL INSURANCE,**

Appellees.

Appeal from the Iowa District Court for Linn County, August F. Honsell, Judge.

Gardner challenges the district court order upholding the industrial commissioner's decision denying him workers' compensation benefits. **AFFIRMED.**

J. Richard Johnson of White & Johnson, P.C., Cedar Rapids, for appellant.

Craig A. Levien and Vicki L. Seeck of Betty, Neuman & McMahon, Davenport,
for appellees.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

HAYDEN, J.

Craig Gardner seeks workers' compensation benefits from his former employer, Poured Walls of Iowa, Inc. (Poured Walls), for an injury sustained to his back. Gardner allegedly sustained the injury at work on November 27, 1989, when he fell after stepping in a straw-covered hole while carrying a heavy concrete form. According to Gardner, as he fell his body twisted and the form fell on top of him injuring his back and ankle. Gardner claimed Gary Osten, the worker helping him carry the concrete form, witnessed the entire event.

At the hearing before the deputy industrial commissioner, Gardner's foreman, Dan Hopkins, testified there were no holes on the job site in which Gardner could have fallen. Hopkins further testified Gardner asked him on the morning of November 27 whether Poured Walls carried workers' compensation insurance. According to Hopkins, although Gardner was supposed to report injuries to him, Gardner never informed Hopkins of the alleged injuries sustained to his back and ankle. In fact, Hopkins confirmed Gardner told other people he hurt his ankle while at home the previous day. Joan Musil, Poured Walls' bookkeeper, testified Gardner came in to pick up his paycheck on November 27, 1989, and indicated he had injured his ankle on the weekend and would not be at work for a couple of days.

Three days after the alleged accident, Gardner sought medical attention for his back from Dr. Ahn, his family physician. Dr. Ahn had treated Gardner for continued lower back problems for approximately three years. Gardner later saw Dr. Strathman

who hospitalized him and treated him with traction and medication. Approximately six months later, Gardner was hospitalized again. Dr. Strathman opined Gardner suffered no permanent impairment.

During hearing, the deputy did not allow Gardner to present Osten's deposition testimony. Despite this exclusion, the deputy found Gardner's back injury to have arisen out of and in the course of his employment. The deputy ordered Poured Walls to pay temporary total disability benefits for 14.858 weeks and medical expenses of \$4556.05. The deputy also found Poured Walls unreasonably denied benefits once it received the eyewitness testimony of Osten and ordered it to pay penalty benefits equal to 9.143 weeks.

Although the deputy excluded the deposition, the industrial commissioner admitted it into evidence. The industrial commissioner, however, determined Gardner did not carry his burden of proving he suffered an injury arising out of and in the course of his employment with Poured Walls. He therefore reversed the deputy's decision. Upon Gardner's petition for judicial review, the district court affirmed. Gardner now appeals the district court's decision. Gardner contends, although the deposition testimony of Osten was properly considered by the industrial commissioner, it should have been admitted at hearing in front of the deputy. Gardner further contends the decision of the industrial commissioner should be reversed and the deputy's decision reinstated including its award of temporary total disability benefits, section 85.27 expenses, and section 86.13 penalty benefits.

I. Admissibility of Osten's Deposition.

Gardner asserts error occurred at the agency level because the deposition of Osten was not considered by the deputy. Gardner did not preserve this issue for appeal. As a general rule, issues not presented in the trial court may not be raised for the first time on appeal. *Conner v. State*, 362 N.W.2d 449, 457 (Iowa 1985). Furthermore, when reviewing agency action, "the district court and the appellate court may only review issues considered and decided by the agency." *Grudle v. Dept. of Revenue and Finance*, 450 N.W.2d 845, 847 (Iowa 1990). This rule stems from the doctrine of error preservation. *Interstate Power v. Commerce Comm'n*, 463 N.W.2d 699, 701 (Iowa 1990). In order to preserve error for appeal, a party must raise the issue before the agency. *Id.* The issue concerning whether the deputy improperly excluded the deposition testimony of Osten was not litigated within the agency or the district court; therefore, it cannot be argued on appeal.

Furthermore, even if this issue was properly preserved, we would not reverse the agency's decision because Gardner was not prejudiced by the deputy's denial to consider Osten's deposition. We have long held an agency action will not be reversed unless a party has in fact been harmed. *Sioux City Comm. Sch. v. Board of Public Inst.*, 402 N.W.2d 739, 744 (Iowa 1987); *Panhandle Co-Op. Ass'n, Bridgeport, Neb. v. E.P.A.*, 771 F.2d 1149, 1153 (8th Cir. 1985) ("Before an agency action may be set aside for lack of punctuality, the aggrieved party must show that it was prejudiced by the delay."); *City of Des Moines v. Public Employment, Etc.*, 275 N.W.2d 753, 759 (Iowa

1979) (agency action should not be tampered with unless the complaining party has in fact been harmed).

This court cannot conceive and Gardner does not suggest how his status before the agency would have changed the record if the deputy had considered the deposition. Although the deputy failed to consider the deposition, she found *for* Gardner. The industrial commissioner, on the other hand, admitted the deposition and considered it with the rest of the evidence. The industrial commissioner, however, held *against* Gardner. *See also Hy-Vee Food Stores v. Civil Rights Comm'n*, 453 N.W.2d 512, 530 (Iowa 1990) (employer not prejudiced by failure of Civil Rights Commission to notify it of its intention to take oral arguments, where opposing counsel notified employer one day before arguments and employer chose not to appear); *Sioux City Comm. Sch.*, 402 N.W.2d at 744 (refusal to permit education association to intervene in administrative proceeding was not prejudicial error).

Gardner did not properly preserve error nor was he prejudiced by the deputy's decision to exclude Osten's testimony. Therefore, we need not determine whether the deputy properly excluded Osten's deposition testimony.

II. Reinstatement of the Deputy's Decision.

Gardner urges this court to reinstate the decision of the deputy finding him entitled to workers' compensation benefits. This court, however, does not have authority to reinstate the deputy's decision. *Tussing v. George A. Hormel & Co.*, 461 N.W.2d 450, 451 (Iowa 1990) (the district court and supreme court have no authority

to reinstate the deputy industrial commissioner's order). The decision of the deputy was a proposed decision within the contemplation of Iowa Code section 17A.15(2). *Id.* at 451-52. Because the decision was appealed to the agency, the industrial commissioner, pursuant to section 17A.15(3) assumed full responsibility for deciding anew all issues of fact and law. *Id.* at 452. Upon judicial review of the industrial commissioner's order, the deputy's decision is no longer a viable step in the proceeding. *Id.* As such, if Gardner is entitled to relief in the case at bar, the remedy lies in a remand to the industrial commissioner rather than reinstatement of the deputy's order. *Id.* at 451.

III. Scope of Review.

Decisions of the industrial commissioner are reviewed by the district court pursuant to Iowa Code chapter 17A. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993). See Iowa Code § 86.26. Our decision is controlled by the limited scope of review applicable to decisions of an administrative agency. *Kostelac v. Feldman's, Inc.*, 497 N.W.2d 853, 856 (Iowa 1993). We can only consider the assigned grounds of error under section 17A.19(8). *Northwestern Bell Tel. v. Commerce Comm'n*, 419 N.W.2d 712, 714 (Iowa 1988). The review is for corrections of errors at law, not de novo, and the findings of the industrial commissioner have the effect of a jury verdict. *Kostelac*, 497 N.W.2d at 856. A district court's decision rendered in an appellate capacity is reviewed to determine whether the district court correctly applied the law. *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162, 165 (Iowa 1982).

Iowa Code section 17A.19(8) provides in contested cases the court shall grant relief from an agency decision which is unsupported by substantial evidence made before the agency when the record is viewed as a whole. *Eaton v. Iowa Dep't of Job Serv.*, 376 N.W.2d 915, 916-17 (Iowa App. 1985). We are bound by the agency's findings of fact if those findings are supported by substantial evidence. *Sharp v. Employment Appeal Bd.*, 479 N.W.2d 280, 282 (Iowa 1991). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. *Id.* at 917. The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 734 (Iowa App. 1986). The fact two inconsistent conclusions can be drawn from the evidence does not mean one of those conclusions is unsupported by substantial evidence. *Id.* The burden rests on the claimant, Gardner, to show by a preponderance of the evidence the injury arose out of and in the course of employment. *Kostelac*, 497 N.W.2d at 856.

IV. Substantial Evidence Supporting Industrial Commissioner's Decision

After reviewing the evidence in the record, we find there is substantial evidence to support the industrial commissioner's decision to deny workers' compensation benefits. Assessing the credibility of witnesses is a role peculiarly within the realm of the fact finder. *Kostelac*, 497 N.W.2d at 858. The industrial commissioner found the evidence presented by defense witnesses Hopkins and Musil credible. Their testimony revealed Gardner made statements to Musil and other employees indicating he hurt his

ankle over the weekend. The industrial commissioner also found it significant Gardner asked Hopkins, shortly before the alleged injury occurred, whether the employer carried workers' compensation insurance. Additionally, after the alleged injury, Gardner did not report the injury to his foreman, Hopkins. Instead, Gardner left the job site with Osten and went to Osten's apartment where they claim they tried to contact the employer by telephone.

The industrial commissioner gave little weight to the testimony of Gardner and Osten, and furnished persuasive reasons for doing so. Osten's testimony was submitted by affidavit only, and defendants did not have the opportunity to cross-examine him during the making of the affidavit. Although the industrial commissioner considered the deposition testimony of Osten, he felt it added little substance to the affidavit. The commission had additional reason to discredit the testimony of Osten because he was a friend and coemployee of Gardner. The industrial commissioner also had good reason to discredit Gardner's testimony. Gardner's credibility was directly contradicted by statements he made to others concerning the source of his injury, and whether the employer had workers' compensation insurance.

There was some evidence in the record from which the industrial commissioner could have concluded Gardner's injury stemmed from his employment. The evidence, however, was in conflict and the industrial commissioner drew a contrary conclusion. Given the evidence presented at hearing, there was substantial evidence presented for the industrial commissioner to conclude Gardner's injury was due to a nonwork-related

accident. Therefore, we do not consider Gardner's claims he is entitled to an award for temporary total disability benefits, section 85.27 expenses, and section 86.13 penalty benefits.

We affirm.

AFFIRMED.