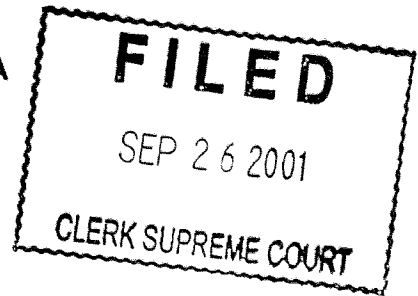


IN THE COURT OF APPEALS OF IOWA

No. 1-183 / 00-0868
Filed September 26, 2001



TOBY BROWN, Claimant,
Petitioner-Appellant,

vs.

QUIK TRIP CORPORATION,
Employer, and CNA INSURANCE,
Insurance Carrier,
Respondents-Appellees.

Appeal from the Iowa District Court for Linn County, Thomas Horan,
Judge.

The petitioner appeals from the district court's ruling on judicial review affirming the workers' compensation commissioner's decision denying his claim for workers' compensation benefits arising for a posttraumatic stress disorder. The petitioner claims that the commissioner erred in determining he had not established that his witnessing of a shooting and being robbed within a six-day period was the legal cause of his disorder. **REVERSED AND REMANDED.**

Thomas J. Wertz of Wertz & Leehey, Cedar Rapids, for appellant.

Deborah A. Dubik and Peter J. Thill of Betty, Neuman & McMahon, L.L.P.,
Davenport, for appellees.

Heard by Sackett, C.J., Huitink and Streit, JJ., but decided en banc.

000019

SACKETT, C.J.

Appellant Toby Brown appeals the district court's decision affirming the Workers' Compensation Commissioner's finding that the appellant did not meet his burden to prove legal causation for the mental/mental injury he allegedly sustained as an employee of appellee Quik Trip Corporation. In its proposed decision the deputy industrial commissioner concluded that Brown had sustained an injury, finding Brown had demonstrated both medical and legal causation in establishing this injury. In its May 28, 1999, ruling, the commissioner disagreed that the appellant had made any showing of legal causation. It therefore reversed the deputy's decision, effectively denying the appellant recovery for his claimed mental/mental injury. The district court affirmed the commissioner. We reverse and remand to the commissioner.

Appellant claims on appeal that the commissioner and the district court erred in 1) finding he had not presented the necessary evidence to support a finding of legal causation; 2) requiring the testimony of similarly situated workers as necessary proof in a finding of legal causation; 3) failing to distinguish the proof requirements of non-traumatic and traumatic injuries. Appellant Brown further claims that failure to distinguish proof requirements for non-traumatic injuries from those for traumatic injuries is unconstitutional.

Toby Brown, a business college graduate and a former Marine and coast-to-coast truck driver, took a job working at a Quik Trip gas and convenience store in January of 1990. On January 18, 1994, at about one o'clock in the morning, a fight at the front counter of the Cedar Rapids store Brown was tending escalated,

and a female customer was shot in the thigh. Brown observed the shooting, and he had to clean up a significant amount of blood afterward. As a witness to the crime, Brown became involved in identifying the perpetrators at the police station, and he also testified about the incident in court.

Less than a week after this January 18 shooting, Brown was again working an overnight shift at a Quik Trip store in Cedar Rapids. Again at about one o'clock in the morning Brown was robbed at what he believed to be gunpoint.¹ After approaching Brown from behind and sticking an object in his back, the robber forcibly moved Brown to the cash registers, demanding that he hand him all of the money the registers contained. The robber forced Brown to crouch down while he left the store, but immediately re-entered the store, threatening to "blow [Brown's] . . . head off," scaring him into assuming a spread-eagle position on the floor. Brown did not finish his shift that night and took a one-week break from work shortly thereafter.

In February of 1995, upon a recommendation from one of Quik Trip's Iowa corporate heads, Brown began seeing a counselor to help himself cope with shakiness, stomach upset, an aching chest, and nervousness. In April of that year he saw Dr. Wayne Alberts for treatment of sores that had begun developing in his mouth. In August of 1995 Brown began consulting Dr. Alan Whitters, a psychiatrist referred to him by Dr. Alberts.

Dr. Whitters stated Brown suffers from delayed posttraumatic stress disorder, and that it is attributable to the 1994 incidents at Quik Trip. Dr. Whitters has further asserted that the robbery had a cumulative traumatic effect on Brown.

¹ There is question as to whether or not a gun was actually involved in the robbery.

Apparently the additional trauma of the robbery had so aggravated the trauma of the shooting that the actual trauma Brown suffered as a result of these contemporaneous incidents was beyond merely a summation of the two independently traumatic events.

In concluding that "the [robbery] incident on January 24, 1994, was a major and substantial cause of Brown's mental condition of posttraumatic stress disorder, delayed," the commissioner adopted Dr. Whitters's conclusions, finding Brown had sufficiently established medical causation to recover for his injury. The commissioner additionally found, however, that Brown had not succeeded in establishing legal causation for his injury.

The element of legal causation, necessary in establishing a work-related injury, presents a question of whether the policy of the law will extend responsibility to those consequences which have in fact been produced. *Dunlavey v. Economy Fire and Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). Iowa now employs an "unusual stress" standard in determining whether a "mental/mental" injury is compensable under Iowa Code section 85.3(1). *Id.* at 856. The standard provides that after proving medical causation, an employee has the burden of demonstrating that the claimed mental injury "was caused by workplace stress of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs." *Id.* at 857 (citing *Graves v. Utah Power & Light Co.*, 713 P.2d 187, 193 (Wyo.1986)). This standard furthers the intent of the legislature to compensate those workers who suffer bona fide "personal injuries" caused by their employment. *Id.* at 856. By

comparing the stresses endured by similarly situated employees, the standard provides the employees with compensation for legitimate work related injuries while at the same time limits the employers' liability to injuries caused by its industry. *Id.* at 857.

Under *Dunlavey* the employee has the burden to establish that the mental injury was caused by a greater amount of workplace stress than is usually endured by those in the same or similar jobs. *Id.* at 858. Although evidence of workers with similar jobs employed by a different employer is relevant, evidence of the stresses of other workers employed by the same employer with the same or similar jobs will usually be most persuasive and determinative on the issue. *Id.*

The commissioner, in concluding that no substantial showing of unusual stress had been made, said:

. . . claimant introduced no evidence or witnesses, other than his own testimony, to establish that the stress he experienced as a Quik Trip attendant was greater than that experienced by other gas/food station attendants. Further, the evidence submitted by defendants of the frequency and occurrences of these type of incidents reflects that these experiences are quite common for the industry in which he is employed. Although claimant established medical causation, he failed to establish legal causation.

The only evidence Brown offered to establish that his stress was unusual in his line of work was evidence of the traumatic events themselves. To rebut the claimed legal causation, appellee Quik Trip offered an exhibit showing statistics as to occupational incidents in 1995.²

² Brown's injury was in 1994.

The statistics show that of the 675 employee fatalities in retail trade businesses in the entire United States in 1995, only thirty-six were due to assaults and violent acts in gasoline service stations. (In comparison, 151 fatalities due to violence occurred in grocery stores.) Further, with respect to non-fatal injuries from violence at gas stations in 1995, the incidence rate was 2.7 injuries per 10,000 employees. That is, gas station employees injured by violence while on the job represented .027% of all gas station employees in 1995.

Given the available statistics regarding the low incidence of death or injury of gas station attendants due to violence on the job, we would question whether the commissioner's conclusion that violent acts are "quite common" in the gas station business is supported by substantial evidence. However, Brown did not challenge on appeal the sufficiency of the evidence to support this conclusion.

Brown's claim is that the commissioner and district court erred in denying recovery because he had not established legal cause.

Our review of Workers' Compensation Commission decisions is governed by the Administrative Procedure Act, Iowa Code chapter 17A. *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 354 (Iowa 1998). We will grant relief where substantial rights of a party have been prejudiced because the agency action is in excess of the agency's statutory authority, is unsupported by substantial evidence, is unreasonable, arbitrary, or capricious, or is affected by other error of law. *Id.*, See Iowa Code § 17A.19(8) (1997). When reviewing the decision of the district court we must determine whether the district court properly

applied the law. In reviewing its decision we apply the standards of section 17A.19 to the agency action and determine whether our conclusions are the same as the district court's. *Bearce v. FMC Corp.*, 465 N.W.2d 531, 534 (Iowa 1991).

The employee Brown has the burden to establish the requisite legal causation. *Dunlavey*, 526 N.W.2d at 858. *Dunlavey* suggests that evidence of stresses endured by workers employed by the same employer as the claimant is persuasive and likely determinative of the issue of workplace stress and whether the claimant's stress is unusual in that line of work. *Id.* In determining Brown had not established legal causation, the commissioner consulted post-*Dunlavey* opinions, all of which contained testimony by similarly situated employees for purposes of making a determination of unusual stress.³ None of these cases, however, requires that there be such testimony in order to establish unusual stress. Notably in *Moon* and *Blanchard*, offered testimony served only to discount the employees' claims of unusual stress. Testimony for the purpose of determining unusual stress in these cases merely served to augment the record

³ See *Moon v. Board of Trustees*, 548 N.W.2d 565 (Iowa 1996). The commissioner also looked to several prior arbitration decisions: *Blanchard v. Supply Co.*, file no. 1048262 (arb. dec. 1996); *Roche v. Department of Community Corrections*, file no. 910537 (remand dec. 1995) (same); *Fleming v. Humboldt Community Schools*, file no. 1051965 (arb. dec. 1995). For these cases on appeal, see *Humboldt Community Schools v. Fleming* 603 N.W.2d 759 (Iowa 1999) (testimony of several superintendents regarding their everyday stress was substantial evidence that claimant superintendent had been under an unusual amount of stress from community members opposed to his educational plan); *City of Cedar Rapids v. Board of Trustees*, 572 N.W.2d 919 (Iowa 1998) (testimony by police officers regarding everyday stress was substantial evidence that claimant police officer had suffered unusual stress while watching trapped accident victims burn to death); *Blanchard v. Belle Plaine/Vinton Motor Supply Co.*, 596 N.W.2d 904 (Iowa Ct. App. 1999) (testimony by fellow business associates that they were not unusually anxious about a business sale was substantial evidence to deny businessman's widow's claim that her husband's suicide was due to unusual stress).

from which the factual determination was made; it was not determinative or dispositive with respect to a finding of legal causation.

In relying on Brown's failure to introduce extrinsic evidence to establish unusual stress, and in thereby discounting Brown's own testimony evidencing the truly remarkable chain of events he faced as a Quik Trip employee, the commissioner's decision denying Brown recovery due to a supposed failure to establish unusual stress is an error at law.

We would agree with Quik Trip to the extent that in the majority of cases testimony of similarly situated employees that the stress an employee claims created a compensable mental injury is needed to prove legal causation. Yet we disagree with Quik Trip and the commissioner that Brown failed to introduce substantial evidence which, if believed, would prove the necessary elements of legal causation. There is evidence that in less than a one-week span of selling gas and groceries, Brown (1) witnessed a shooting; (2) cleaned up blood from that shooting; (3) was robbed at what he perceived to be gun point; and (4) was told his brains would be blown out by a robber who he perceived to have a gun. This evidence alone would support a finding that Brown suffered unusual stress in his job at Quik Trip. We reverse and remand to the commissioner to determine whether Brown has established legal causation in accordance with the views expressed in this opinion.

REVERSED AND REMANDED.

Huitink, Mahan, Zimmer, Miller, and Vaitheswaran, JJ. concur; Hecht and Vogel, JJ. concur in part and dissent in part.

HECHT, J. (concurring in part and dissenting in part).

I concur in part and dissent in part. Our supreme court has adopted the Wyoming Supreme Court's formulation of the "unusual stress" standard. Pursuant to this standard:

in order for an employee to establish legal causation for a *nontraumatic* mental injury caused only by mental stimuli, the employee must show that the mental injury "was caused by workplace stress of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs," regardless of their employer.

Dunlavey v. Econ. Fire & Cas. Co., 526 N.W.2d 845, 857 (Iowa 1995) (citing *Graves v. Utah Power & Light Co.*, 713 P.2d 187, 193 (Wyo. 1986) (emphasis added)). The standard was formulated for adjudication of nontraumatic mental injury cases because the Wyoming Court believed "the risk of groundless claims loom[ed] large" given the inherent difficulty in linking such injuries to a worker's employment. *Graves*, 713 P.2d at 192 (quoting *Townsend v. Maine Bureau of Pub. Safety*, 404 A.2d 1014, 1018 (Me. 1979)). The unusual stress standard was designed to distinguish nontraumatic mental injuries arising out of the employment from those caused by a general inability to cope with the stress of everyday life. *Dunlavey*, 526 N.W.2d at 856. When proving unusual stress resulting from nontraumatic injuries, "evidence of the stresses of other workers employed by the same employer with the same or similar jobs will usually be most persuasive and determinative on the issue." *Id.* at 858.

I believe the commissioner erred when she applied the unusual stress standard in this case because the injury sustained by Brown was traumatic in origin. Brown observed a shooting and was robbed in the course of his

employment within a single week. Soon thereafter he was treated for posttraumatic stress syndrome. The traumatic mental stressors experienced by Brown are readily distinguishable from instances of nontraumatic stress that precipitated the unusual stress standard. I would hold *Dunlavey*, a case presenting a nontraumatically-induced mental injury, neither requires nor justifies the commissioner's application of the unusual stress standard in this case. Accordingly, Brown had no burden to present evidence of stresses experienced by other convenience store workers.

I believe the commissioner's decision must be reversed for an additional reason. If, contrary to my belief, the unusual stress standard must be applied even to claims alleging mental injuries arising from traumatic stressors, I would hold a reasonable fact finder could not find the stress experienced by Brown was usual for convenience store workers. The commissioner found data offered by the employer and insurance carrier reflected stressors of the type experienced by Brown "are quite common for the industry in which he is employed." After a careful review of the data, I conclude the data proves beyond dispute the rarity of the incidence of assaults and violent acts in occupations⁴ similar to Brown's. Thus, I concur in the reversal of the commissioner's decision.

I dissent, however, from the scope of the remand ordered by the majority. Having concluded Brown established legal causation as a matter of law, I would remand to the agency for the limited purpose of determining the extent of the claimant's industrial disability.

Vogel, J., joins in this partial dissent.

⁴ The data does not include specific statistics for convenience store clerks.