IN THE COURT OF APPEALS OF IOWA

No. 4-531 / 94-279

JOHN D. LAWRENCE, Claimant,

Petitioner-Appellee,

vs.

INTERNATIONAL PAPER CO., Self-Insured Employer,

Respondent-Appellant.

FILED
SEP 22 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Clinton County, C.H. Pelton, Judge.

The respondent employer appeals the district court's decision on judicial review reversing the industrial commissioner's decision denying the petitioner workers' compensation benefits for an alleged work-related injury on March 14, 1990. **REVERSED AND REMANDED.**

Vicki L. Seeck of Betty, Neuman & McMahon, Davenport, for appellant.

Robert McGee, Clinton, for appellee.

Considered by Sackett, P.J., Huitink, J., and Peterson, S.J.*

*Senior judge from the 1st judicial district serving on this court by order of the Iowa Supreme Court

PETERSON, S.J.

The petitioner, John Lawrence, was born on December 21, 1962, and was twenty-nine years old at the time of the hearing on his petition for arbitration. He is a high school graduate and completed one semester at Clinton Community College. At the time of the hearing, he was attending Hamilton Technical Institute and pursuing a course in computer-aided drafting.

He began work for the respondent, International Paper Company, in 1983. Prior to that time, he had worked at a Clark Gas Station and, at the time he terminated his employment there, he was the assistant manager. He was assigned to various jobs after he began with International Paper Company and in 1986 was transferred to the shipping department. He operates, generally, a forklift vehicle in that department.

In 1987, he was driving the forklift vehicle and had just completed unloading a trailer. Whenever there was an unloaded trailer and that trailer was going back to the plant, they would try to put something in the trailer so that there was not an empty haul back to the plant. He was in the process of reloading the trailer when the driver pulled the trailer away from the dock. Normally, when a trailer leaves the dock, a dock plate is removed and the door dropped down on the trailer. That hadn't been done, and as he was driving into the trailer, the driver pulled the trailer away from the dock. Lawrence attempted to get traction on his vehicle to get into the trailer, but it happened so fast that the truck got away from the dock and his vehicle fell off the dock. However, the front end of the vehicle, "the forks," stayed in the truck so that

his vehicle did not completely fall out of the truck. At that time he was a little shaken up and had bruises on both sides of his arms.

He was sent to the emergency room where he was seen by the attendant. He was taken there by one of the lead employees of the paper company. He remembered the person who he saw was a male individual. There were no X-rays taken and he was examined for broken bones. The only observation that was made at that time was that his arms were "just red." He said his back did not hurt him at that time, and he returned to work. On that day he worked a normal eight-hour shift and an additional four hours overtime. He did not notice any injuries or any problems in the next couple of days or the next couple of weeks after the incident.

Prior to this incident, when he was working on the stripping line, he had some back problems and saw Dr. Droste, a chiropractor. He could not identify any particular incident that caused him to see Dr. Droste. He described his symptoms as "achiness in the lower back." He said that when it bothered him he would not do certain things. Dr. Droste recommended he do some outside exercises and thought his problem was "just tight muscles."

On October 11, 1989, he consulted Dr. Ginther, an orthopedic physician. He explained the reason for seeing Dr. Ginther by stating that when they were working at the warehouse in a situation where the dock plates were very rough, he would be bothered a lot and some days it was not bad. He said it depended upon how busy you were on which dock.

Dr. Ginther's records indicated Lawrence came to see him for an ache in his lower back. The notes indicate that Lawrence had had it on and off for a number of months and less often than that for a couple of years. Lawrence indicated his right leg seemed to tire a little more quickly than the left and would not hold him up quite as well after he got off his forklift truck.

Dr. Ginther's notes indicate that his examination revealed that Lawrence was able to stand upright and to bend forward fairly far except for tight hamstrings. His side bending was normal with proper relaxation of the musculature, although there was some pain as he got to the far extreme on both sides. His back bending was painful to him, although he did get a reasonable relaxation of the paraspinals. He could stand on either leg, walk on his toes, and walk on his heels. The main tenderness was over the posterior spine of L5, with the pain not going up or down a whole lot, and then spreading to the paraspinal muscles on either side. His hip flexion past 120 degrees was not painful to him. There was no popliteal fossa tenderness. Reflexes were normal and motor strength was normal to the toes, ankles, knees, and hips. X-rays were taken and reviewed, and Dr. Ginther's notes indicate they were within normal limits except for some straightening of the lumbar spine consistent with a muscle spasm. Dr. Ginther's notes indicated that Lawrence was to work on a stretching and conditioning program and gave him a prescription for physical therapy for that. He suggested he come back in three weeks if things had not markedly improved by then. He also suggested he use a shower massage and that he

use swimming at the YMCA rather than the weight room for the time being. Dr. Ginther emphasized that the main thing Lawrence needed to do was work on stretching at that time and avoid things that were going to bother him, such as the second-half of a situp. He indicated he needed to see him sooner than three weeks if he was getting worse. Lawrence did not return to see Dr. Ginther.

On March 13, 1990, Lawrence was working the third shift. This began at approximately 10:00 p.m. and ended at approximately 6:00 a.m. on the following day. At that time, they were in a transition from an old location to a new location and things were not organized. They were traveling with their vehicles from one end of the plant to the other end because it had not been decided how they were going to set up the warehousing. The driving was back and forth over a floor which he described as "kind of like a washboard." He said "the sections were unlevel and when you drive over it at a high rate of speed it was like driving over a washboard and I had done it probably for a week and a half." He estimated it was between three quarters of a mile and a mile from one end of the plant to the other. He said that during that evening he had just unloaded some trailers and his back had been sore, but it was not until after he got off the fork truck and walked over to get a drink that it was really sore. He said it had not been sore when he arrived at work that day, but it had gotten a little sore during work. He could tell that it was sore when he walked over to get a drink; however, it was only half an hour before break time, so he went back to work. At 3:00, during the break, he was sitting with Steve Coppess, his lead person. He told

Coppess that at the time his back was really starting to bother him and it was sore. Coppess asked him did he do anything, and he said he did not know but it was not sore when he got to work. However, he did go back to work and finish that shift.

He then went home and went to bed. During his sleep, he rolled over in bed, which he felt was approximately two hours later, and felt a real sharp pain. The pain was in his lower back. He attempted to get out of bed; however, he could not do so and he called his mother from an adjacent phone.

His mother came to his house and assisted him out of bed and took him to the emergency room, presumably of a local hospital.

He was examined by Dr. Tharleton Barnes. Dr. Barnes' records indicate that Lawrence came in secondary to an injury about three years ago at work when an end loader he was operating fell off the back of a truck. The record indicates that since that time, he has had increased difficulty with his back. He had marked difficulty with his back at the present time, pain down his right leg and to his right calf. Straight leg raising was markedly positive on the right. Knee and ankle jerks, E.H.L., sensation appear intact. The X-rays appeared normal. The record indicates Lawrence was walking with a marked list. Dr. Barnes put him on bed rest with hot packs and prescribed a CT scan and an MRI test. The record indicates Lawrence was to be seen by Dr. Barnes on the following Friday. At the time Lawrence saw Dr. Barnes, he felt that the incident that occurred on March 13 and 14 was a separate injury because he had not had any problems that day or prior to that day. Lawrence, however, did not

tell Dr. Barnes about the March 13-14 incident. He did indicate that they went over his medical history and when Dr. Barnes asked him about his back history, that is if he had had a car accident or was thrown from a horse, they discussed the 1987 accident.

Dr. Barnes' records indicate that he saw Lawrence on April 4, 1990. He was in receipt of a report from Dr. Holl of the routine MRI examination. Dr. Holl's report indicates abnormal MRI images of the lumbar spine. His examination revealed some mild disk protrusion in the center at the L5, S1 interspace. Dr. Barnes' records indicate that the patient's CT scan and MRI showed disk protrusion of L5, S1. At that time Lawrence showed Dr. Barnes a picture of the end loader he was using that fell out of the truck. The records indicate Lawrence stated he had never had any trouble with his back until then, and since then this has been his problem. Dr. Barnes notes that "I think it is related to this injury."

Dr. Barnes' record indicates that on April 19, 1990, Lawrence wanted to return to light duty at the paper company. Dr. Barnes allowed him to do this and stated he would check him in two or three weeks or sooner if he was having difficulty.

On April 25, 1990, an evaluation was performed by Dr. Ancheta. His report indicates that he was referred by Dr. Barnes for an evaluation and an EMG because of low back pain. The record indicates that Lawrence told him he had had low back discomfort dating back about three years which he related was due to a fall at work. The record indicates that Lawrence recalled being seen by Dr. William Myer, the

company doctor, at the time. The record also indicates that Lawrence told him he had seen Dr. Ginther on October 11, 1989, who treated him conservatively with physical therapy. Lawrence told Dr. Ancheta, according to the record, that he really did not have any severe pain up until March 14, 1990, when he was driving a forklift which was rather bumpy. He saw Dr. Barnes on that day and was treated conservatively with bed rest and physical therapy. The record indicates that Lawrence claimed he had been provided significant relief and he now considered himself about ninety percent better than when compared to five weeks previously. The record indicates that Lawrence told him that he had several workups done, including a plain lumbar CT scan which revealed an L5, S1 disk protrusion. He also told Dr. Ancheta that he had been to see Dr. Hershberger three weeks before and that Dr. Hershberger told him that surgery was not being recommended because he had obtained relief with physical therapy.

Dr. Ancheta's record indicates that Lawrence said the pain was mostly in the low back with occasional radiation to the right leg and to the level of the calf. The symptoms were aggravated by sitting on a soft chair, walking briskly, bending, turning in bed, during and following a day of daily activities. Lawrence told Dr. Ancheta that he found relief with bed rest, a heating pad, and Advil. Lawrence denied any associated specific muscle weakness, bladder and bowel difficulties.

On April 27, 1990, Dr. Barnes again saw Lawrence and reviewed Dr. Ancheta's report with him. Treatment was recommended; however, that treatment was not set forth in the report.

Dr. Barnes saw Lawrence again on May 14, 1990. The record indicates although Lawrence was having difficulty with his workers' compensation, he was doing fine and would like to go back to work. The notes indicate that the patient was going to return to work "I think on Monday."

On June 21, 1990, Dr. Barnes again saw Lawrence. The record indicates that he was having a lot of difficulty with spinal headaches from the myelogram. Dr. Barnes told him to stay down, which relieved him, and he would see him again in a week.

On June 29, 1990, Dr. Barnes again saw Lawrence. His record indicates Lawrence was having difficulty with his back when he got up from driving. Lawrence said he could not straighten up right away and it took a little while before he could straighten up. Dr. Barnes indicated they would try a corset and a set back pad to see if that helped him.

The next note in Dr. Barnes' records was dated July 27, 1990. That note indicated the patient was back at work and was also going to the YMCA to work out on the Nautilus. The note indicates Lawrence was to be checked in about a month.

Dr. Barnes saw Lawrence again in August of 1990. At that time, Lawrence was having very little difficulty and he was discharged. Lawrence again came in to

see Dr. Barnes in January of 1991 and requested a different corset. Dr. Barnes' assessment of Lawrence's injuries at that time appeared to be the same and that his pain and complaints were the same. He felt that Lawrence still had a bulging disk at the L4-L5 and L5-S1. The last time he saw Lawrence was in May of 1992, and it appeared to Dr. Barnes that Lawrence had a protruded disk at L5-S1, probably more on the right and had intermittent difficulty with that.

Dr. Barnes believes Lawrence had a permanent injury and will probably continue to have problems with this condition. He believes he should have a weight-lifting limit of a maximum of forty pounds and repetitive to fifteen or twenty times.

Dr. Barnes was asked "Do you have an opinion within a reasonable degree of medical certainty as to whether that impairment of 5% is related to the accident that happened in 1987?" His response was, "Well, I think that's when his difficulty started." Dr. Barnes, when questioned about the possibility of an accident in March of 1990, said that "since the test were done after March of 1990, that's the first objective evidence I have of when he -- of what's wrong with the man." "When he developed this, I don't know other than March -- after March of 1990."

Lawrence advised his employer of the March 13-14 incident and that he would not be at work by talking to Diane Honeywell. He told her he would not be able to report on the third shift because he had been to the doctor and that he had a hard time getting out of bed that morning and his back had been bothering him. He said he did

not think it happened at work the night before, they were not sure if it happened when he went off the dock.

Lawrence also spoke with another employee of the paper company, Susan Nixon, about his injury of March 13 or 14 of 1990. In the report she was required to make, she indicated Lawrence said he was "unaware of an exposure of being injured, that he had been operating the lift truck as usual." When asked how the accident or injury occurred, Lawrence told her that it was unknown and that he had had problems with his back since he was injured in July 1987 when the lift truck went off the dock.

Lawrence, in his petition for arbitration, alleged he was "operating a fork truck while unloading a truck trailer and the bumping of the forklift repeatedly passing over uneven dock plates aggravated an existing back condition." The ruling of the deputy industrial commissioner was duly appealed to the industrial commissioner, and he reversed the deputy's ruling finding that Lawrence had failed to prove by a preponderance of the evidence that a work injury occurred on March 13, 1990. The industrial commissioner further found that "the greater weight of the evidence showed that the March 13, 1990, represented just another incident of back pain stemming from the 1987 injury, one of many incidents of back pain claimant admits plagued him ever since the 1987 injury." The industrial commissioner further found that even if the claimant had established a work injury on March 13, 1990, that he failed to show this present back condition is causally related to that injury. This ruling was appealed to the district court. That court reversed the industrial commissioner.

finding that the petitioner incurred a work-related disabling cumulative injury that manifested itself on March 14, 1990. The court further found that the record did not support a finding that Lawrence's March 14, 1990, condition stemmed from a 1987 preexisting injury. The district court reversed the industrial commissioner's final agency action of February 26, 1993, and reinstated the deputy industrial commissioner's arbitration decision of August 18, 1992.

The paper company appealed, contending that there is substantial evidence that the claimant did not sustain an injury arising out of and in the course of his employment on March 13, 1990, and that there is substantial evidence that the claimant's disability was not causally related to any alleged injury on March 13, 1990, and that the district court erred in reinstating the deputy's decision.

The decisions of the industrial commissioner are reviewed by the district court pursuant to Chapter 17A of the Iowa Code. *See* Iowa Code § 86.26 (1993). The district court's scope of review under section 17A.19 and the review by the appellate courts under section 17A.20 is at law and not de novo. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993). In our review, we apply the standards of section 17A.19(8) to the agency's actions to determine whether our legal conclusions are the same as those reached by the district court. *Id.* If our conclusions are the same, we affirm; otherwise, we reverse. *Id.*

Iowa Code section 17A.19(a) provides that:

> The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify or grant any other appropriate relief from the agency action, equitable or legal and including declaratory relief, if substantial rights of the petitioner have been prejudiced because the agency action is: . . . (f) In a contested case, unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole.

Evidence is "substantial" if a reasonable person would find it adequate for reaching a decision. *Peoples Memorial Hosp. v. Iowa Civ. Rts. Comm'n*, 332 N.W.2d 87, 91 (Iowa 1982). In making this determination, we are limited to the record made before the hearing officer, including any decision, opinion, or report by the hearing officer. *Id.* The mere possibility that the record would support another conclusion does not permit the district court or this court to make a finding inconsistent with the agency findings so long as there is substantial evidence to support it. *Id.* The fact that two inconsistent conclusions could be drawn from the same evidence does not necessarily mean that one of those conclusions is unsupported by substantial evidence. *Warrell v. Iowa Dep't of Job Serv.*, 356 N.W.2d 587, 589 (Iowa App. 1984).

The findings of the industrial commissioner are to be applied broadly and liberally to uphold rather than defeat the commissioner's decision; they are binding on appeal unless a contrary result is demanded as a matter of law. *Armstrong v. State of Iowa Buildings*, 382 N.W.2d 161, 165 (Iowa 1986). The question on judicial review is not whether the evidence might support a different finding, but whether the evidence supports the findings the commissioner actually made. *Ward v. Iowa Dep't*

of Transp., 304 N.W.2d 236, 237-38 (Iowa 1981). The question is not whether there is sufficient evidence to warrant a decision the agency did not make, but whether there is substantial evidence to warrant the decision it did make. *Woods v. Iowa Dep't of Job Serv.*, 315 N.W.2d 838, 841 (Iowa App. 1981).

We believe that the record in this case contains substantial evidence to support the decision of the industrial commissioner, finding that Lawrence did not sustain an injury arising out of and in the course of his employment on March 13 and 14, 1990.

The records of Dr. Barnes and Dr. Ancheta indicate that the incident in 1987 was described by Lawrence as the beginning of his low back discomfort. When he advised his employer that he would be unable to come to work, he told Diane Honeywell that he did not think that "it happened at work the night before" but the doctors were not sure if it had happened when he went off the dock. He also indicated to Susan Nixon, an employee of the paper company, that he was unaware of an exposure of being injured and he had been operating the forklift truck as usual and that he had had problems with his back since he was injured in July of 1987. Dr. Barnes, in his direct testimony, indicated he believed that Lawrence's difficulties started in the accident of 1987.

Because we believe that there is substantial evidence in the record to support the industrial commissioner's finding that Lawrence did not sustain an accident on March 14, 1990, we do not reach the other issues raised by the appellant.

The industrial commissioner, however, in his ruling acknowledged the cumulative injury rule which the supreme court adopted in *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 374 (Iowa 1985). In that opinion, the Iowa Supreme Court cited with approval the language in *Harper v. Kast Metals Corp.*, 397 S.2d 529, 531 (La. App.) (cert. denied 401 S.2d 988 (La. 1981)). In that case, that court described the cumulative injury rule as:

> "under the prevailing level of the jurisprudence it is not necessary that plaintiff prove his disability results from a sudden unexpected traumatic event. It is sufficient to show merely that the disability was caused by work activity which can be gradual and progressive in nature." *Id.*

Although the commissioner acknowledged the rule in his opinion, he did not set out in the ruling if it did apply or did not apply and his reasons why. Accordingly, we believe that this matter should be remanded to the industrial commissioner to allow him to consider that rule.

In summary, we believe that there is substantial evidence to support the ruling of the industrial commissioner that John Lawrence did not sustain an injury on March 13-14, 1990, but that this matter should be remanded to the industrial commissioner to consider whether or not the cumulative injury rule should be applied in this case.

The decision of the district court is hereby reversed and the matter is remanded back to the industrial commissioner for proceedings consistent with this opinion.

REVERSED AND REMANDED.