IN THE COURT OF APPEALS OF IOWA

No. 1999-468 (9-725) / 98-2068
Filed January 12, 2000

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CLERK SUPREME COURT

ROBERT D. MARSHALL,

Petitioner-Appellant,

vs.

JENSEN TRANSPORT, INC. And GREAT WEST CASUALTY COMPANY,

Respondents-Appellees.

Appeal from the Iowa District Court for Delaware County, Lawrence H. Fautsch, Judge.

The petitioner appeals from the district court's ruling on judicial review affirming the industrial commissioner's decision denying the petitioner's claim for workers' compensation benefits. **AFFIRMED.**

Thomas M. Wertz of Wertz Law Firm, P.C., Cedar Rapids, for appellant.

Stephen W. Spencer and Joseph M. Barron of Peddicord, Wharton, Thune & Spencer, P.C., Des Moines, for appellees.

Heard by Vogel, P.J., Vaitheswaran, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

VAITHESWARAN, J.

Robert Marshall appeals a decision of the industrial commissioner denying his claim for workers compensation benefits. Marshall contends his employer did not prove he was intoxicated. We affirm.

I. Background Facts and Proceedings

On June 27, 1994, Robert Marshall began working for Jensen Transport, Inc. as a trucker, hauling corn syrup from Cedar Rapids to surrounding states. Marshall reported to work on Sunday, July 10, 1994 at 5:30 p.m., and was instructed to deliver a load to Chicago by 6:00 a.m. the following morning. Due to mechanical and other problems, Marshall did not begin the trip until 2:38 a.m. on Monday morning.

Just outside Chicago, Marshall lost control of his truck, which left the road, rolled down an embankment and pinned him inside. Marshall suffered two compression fractures to his spine, two collapsed lungs, two broken ribs, a head laceration and a separated shoulder. He was taken to a Chicago hospital, where he remained for ten days before being transported to the University of Iowa hospitals. A routine test of Marshall's urine revealed the presence of marijuana metabolites.

Marshall seeks workers compensation benefits from Jensen. The deputy industrial commissioner awarded permanent partial and healing period benefits. The industrial commissioner reversed the award. On judicial review, the district court affirmed the commissioner's decision. This appeal followed.

II. Standard of Review

On judicial review of administrative decisions, our function is not to examine the evidence de novo but to correct errors of law. *Manpower Temp. Servs. v. Sioson*, 529 N.W.2d 259, 262 (Iowa 1995). We look only to the final agency decision and determine whether the record supports the agency's ruling. *Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 196 (Iowa 1992). The findings of the industrial commissioner have the effect of a jury verdict. *Kostelac v. Feldman's, Inc.*, 497 N.W.2d 853, 856 (Iowa 1993). We will uphold those findings if they are supported by substantial evidence in the record made before the agency. *Id.* We will not find a lack of substantial evidence to support an agency decision merely because inconsistent conclusions may be drawn from the same evidence. *2800 Corp. v. Fernandez*, 528 N.W.2d 124, 126 (Iowa 1995). Where evidence is in dispute or reasonable minds may differ on inferences fairly drawn from the facts, the commissioner's fact findings are conclusive. *Hawk v. Jim Hawk Chevrolet Buick, Inc.* 282 N.W.2d 84, 87 (Iowa 1979) (*quoting McClure v. Union*, 188 N.W.2d 283, 287 (Iowa 1971)).

III. Intoxication Defense

Iowa Code section 85.16 (1993) provides:

> No compensation under this chapter shall be allowed for an injury caused . . . [b]y the employee's intoxication, which did not arise out of and in the course of employment but which was due to the effects of alcohol or another narcotic depressant, stimulant, hallucinogenic, or hypnotic drug not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury.

Iowa Code section 85.16 is an affirmative defense. *Farmers Coop Oil Ass'n v. Den Hartog*, 475 N.W.2d 7, 10 (Iowa App. 1991). The defendant has the burden of proving intoxication was a substantial factor in causing the injury. *Id.* Iowa Code chapter 85 does not define intoxication. Courts therefore look to the particular circumstances of each case to determine whether a person is intoxicated. *See* James R. Lawyer & Judith Ann Graves Higgs, *Iowa Workers' Compensation Law and Practice* § 7-3, at 81 (3d ed. 1999) (setting forth factors courts have considered, including test results and the claimant's conduct prior to the injury). Intoxication may preclude recovery even if it is not the sole factor in causing the injury. *Id.*

The fighting issue is whether Marshall was intoxicated at the time of the accident. The deputy industrial commissioner concluded he was not; on de novo review, the industrial commissioner concluded he was. We conclude the commissioner's finding is supported by substantial evidence.

We begin with what is essentially undisputed in the record. Although Marshall tested positive for marijuana in his system, the expert witnesses for both parties conceded the test could not identify the level of active ingredients in his system and, therefore, the level of intoxication. In other words, absent additional evidence, the test alone could not establish intoxication. It is also undisputed intoxication could occur only with consumption of marijuana twelve to twenty-four hours before the accident. Therefore, the first question we address is whether there is substantial evidence to demonstrate Marshall consumed marijuana during that time frame.

Marshall denied smoking marijuana at any time after July 8, 1994. However, nurses notes for the evening of July 11th state Marshall told the nurse he had a joint yesterday afternoon." Additionally, a state trooper at the scene discovered marijuana and a pipe in a toiletry kit inside the truck. The trooper did not find signs the marijuana was used in the vehicle and Marshall denied the kit was his. However, the commissioner found that Marshall's denial was not credible and found the presence of marijuana and a pipe in the truck corroborated the nurses notes. We agree and conclude the nurses notes support the commissioner's finding that Marshall "ingested marijuana within 12 to 24 hours of the injury."

We next determine whether the marijuana impaired Marshall's cognitive abilities and was a substantial factor in causing his injuries. The state trooper at the accident scene was unable to question Marshall, given the seriousness of his injuries. No other witness testified that Marshall appeared impaired. *Cf. Farmers Elevator Co., Kinglsey v. Manning*, 286 N.W.2d 174, 178 (Iowa 1979) (noting claimant produced five witnesses who saw claimant at party or subsequent accident and testified he was not intoxicated). Therefore, we are left with the opinions of five experts and Marshall's own comments.

The commissioner chose to rely on the opinion of Dr. George, who testified generally that marijuana impaired cognitive functions, perception, reaction time, learning and memory. He further stated Marshall was most probably impaired by marijuana consumption, and the impairment contributed to the accident. He based this opinion on facts in addition to the urine test, such as Marshall's admitted past

marijuana use, the presence of marijuana in the truck, and the opinion of an accident reconstructionist suggesting a delayed reaction time.

We believe George's opinion begs the question. George presumed based on Marshall's admitted past use of marijuana and George's knowledge of marijuana's effects on reaction time that Marshall must have been intoxicated at the time of the accident. We agree with the deputy industrial commissioner's statement that George made "an opinion about human behavior" beyond his area of expertise and the opinion, therefore, was entitled to no more weight than any other lay opinion. However, the commissioner was entitled to accord whatever weight to this opinion she deemed appropriate. Accordingly, we find no error in her reliance on the opinion. *See Farmers Elevator Co., Kingsley*, 286 N.W.2d at 178; *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa App. 1991).

Marshall's own statements furnish the most compelling evidence of his intoxication. Marshall claimed he was sleepy, not intoxicated, at the time of the accident. However, an insurance adjuster's statement he signed three days after the accident notes: "[a]s far as the events leading up to the accident I don't recall feeling fatigued. I felt pretty good." At the hearing, Marshall was asked why he had not used marijuana since the accident. He stated:

> Well, because, I guess, I spent three weeks in the hospital, and I had two collapsed lungs, and when I got out, I just--I didn't even want to--I had been so long without it, three weeks, I just decided it played enough hassle in my life. I was done with it for good.

As the district court noted, this statement suggests Marshall believed marijuana impaired his judgment and led to the accident and resulting injuries. Accordingly, we conclude the industrial commissioner's decision is supported by substantial evidence.

In light of our conclusion, we need not address Jensen's request that we affirm the agency decision on an alternate public policy ground.

AFFIRMED.