IN THE COURT OF APPEALS OF IOWA

No. 4-468 / 94-0436

FILED
FEB 28 1995
CLERK SUPREME COURT

MICHAEL DREHER,

Petitioner-Appellant,

vs.

VERNON CAMPBELL TRUCKING, Employer, and THE HARTFORD, Insurance Carrier,

Respondents-Appellees.

Appeal from the Iowa District Court for Scott County, Edward B. de Silva, Judge.

Michael Dreher appeals from a district court order on judicial review affirming the industrial commissioner's denial of workers' compensation benefits for failure to comply with the notice requirements of Iowa Code section 85.23 (1993). **AFFIRMED.**

Michael T. Hines of McCarthy & Lammers, Davenport, for appellant.

Greg A. Egbers and Vicki L. Seeck of Betty, Neuman & McMahon, Davenport, for appellees.

Heard by Donielson, C.J., Cady, J., and Keefe, S.J.*

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

CADY, J.

The issue in this workers' compensation case is whether the notice of claim requirements of Iowa Code section 85.23 (1993) were satisfied. The industrial commissioner determined the employer did not have actual knowledge or timely notice within the ninety-day period provided in the statute. He therefore, denied benefits. On petition for further review, the district court affirmed the commissioner. We affirm the district court.

Michael Dreher began driving trucks for Vernon Campbell Trucking (Campbell Trucking) on June 15, 1987. The truck Dreher drove did not have air-ride suspension or power steering. In July 1988, and again in July 1990, Dreher had discectomies that his surgeon, Dr. Richard Roski, later opined were related to work-related repetitive trauma to his lower back.

Dreher did not give Campbell Trucking notice that his back injury was work-related within ninety days after his injury or initial surgery. In fact, he was not aware that his injury was compensable until he spoke with his attorney in 1990. Dreher first informed Campbell Trucking, through the owner and manager Vernon Campbell, that his injury was work-related when he filed a claim for workers' compensation benefits on May 24, 1990.

The industrial commissioner denied Dreher benefits, finding that he had failed to give notice as required by section 85.23. Dreher appealed, contending that Campbell

Trucking knew or should have known that his back surgery was work-related. The district court affirmed the industrial commissioner and Dreher appeals.

Dreher argues that because Vernon Campbell was experienced in truck driving, knew Dreher drove a spring-suspension truck, and knew that he had a pre-existing back injury, he knew or should have known that Dreher's back injury resulting in back surgeries might lead to a workers' compensation claim. He contends this satisfies the actual knowledge requirement of section 85.23.

I. Scope of Review

Our appellate review of the district court's decision on the validity of the industrial commissioner's action is at law. Bearce v. FMC Corp., 465 N.W.2d 531, 534 (Iowa 1991). Like the district court, our review is limited by Iowa Code sections 17A.19 and 17A.20 (1993). We must affirm the agency's findings of fact unless they are unsupported by substantial evidence in the record as a whole. Iowa Code § 17A.19(8)(f) (1993); Dillinger v. City of Sioux City, 368 N.W.2d 176, 182 (Iowa 1985). Evidence is substantial when reasonable minds would accept it as sufficient to support the conclusions drawn. Dillinger, 368 N.W.2d at 182. In a workers' compensation case, the industrial commissioner's findings have the effect of a jury verdict and will be broadly applied to uphold the decision. Id.

II. Notice and Actual Knowledge

Iowa Code section 85.23 requires the employee to give the employer notice within ninety days after the occurrence of the injury unless the employer has actual knowledge of the occurrence of the injury. Dillinger, 368 N.W.2d at 179. If the employee fails to give the required notice and the employer lacks actual knowledge, no compensation is allowed. Iowa Code § 85.23 (1993).

The purpose of the notice requirement is to ensure employers are alerted to the possibility of a claim so an investigation can be made while the information is fresh. Venenga v. John Deere Component Works, 498 N.W.2d 422, 425 (Iowa App. 1993). In the case of a cumulative injury, we have held "the purpose of the 90-day notice requirement is adequately served by requiring the employee to notify the employer within ninety days of the day the employee becomes aware that the injury impacts his or her employment." Venega, 498 N.W.2d at 425.

In the instant case, Dreher acknowledges he did not give his employer, or employer's representative written or verbal notice of his intention to claim work-related compensation. He asserts, however, under the particular circumstances of this case Campbell Trucking had actual knowledge of his injury.

The actual knowledge that obviates the necessity of giving statutory notice must include some knowledge the injury might be work connected or might give rise to a

claim for benefits. Doerfer v. Nicol, 359 N.W.2d 428, 435 (Iowa 1984). "'The test is whether a reasonably conscientious employer had grounds to suspect the possibility of a potential compensation claim.'" Robinson v. Department of Transp., 296 N.W.2d 809, 811 (Iowa 1980) (quoting Bollerer v. Elenberger, 236 A.2d 138, 140 (N.J. 1967). It is not sufficient for the employer to be aware the claimant has an injury. There must "be some knowledge of accompanying facts connecting the injury . . . with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." Robinson, 296 N.W.2d at 811 (quoting Arthur Larson, Workmen's Compensation § 78.31(a), at 15-39 to 15-44 (1976)).

Viewing the record as a whole, there is substantial evidence to support the commissioner's conclusion that Campbell Trucking did not have actual knowledge of Dreher's workers' compensation claim within the ninety day statutory limit. At the hearing, Dreher admitted he had never told Campbell or anyone at Campbell Trucking that he believed his back problems were work related. In July 1988, when he informed Campbell he was going to have back surgery, he merely stated, he was having surgery on an old back injury. He did not state it was related to or aggravated by his current working conditions. Campbell's testimony confirms this. He testified the first indication he had that Dreher's injuries were work related was in May 1990

when Dreher filed a workers' compensation claim. He stated Dreher made minimal complaints about his working conditions and gave him no reason to believe his surgery was related to anything other then a previous injury.

In response, Dreher asserts we should impute to Campbell knowledge that Dreher's injury was work related. Dreher asserts back injuries are common in the trucking industry, Campbell has been in the industry for forty years and has suffered back pain himself, and Campbell was aware of the type of truck Dreher was driving. Dreher claims as a reasonably conscientious employer, Campbell should have known Dreher's back injury was work related and presented a potential compensation claim.

While we understand Dreher's argument, the question we must resolve in this case is not whether the evidence would have supported a finding of actual knowledge. Robinson, 296 N.W.2d at 812. The question is whether the evidence was so overwhelming the commissioner was compelled to find actual knowledge as a matter of law. Id. Because reasonable persons could reach different conclusions from the evidence, we hold actual knowledge was not proven as a matter of law. Id. The district court correctly affirmed the decision of the industrial commissioner denying Dreher workers' compensation benefits. Costs of this appeal are assessed to Dreher.

AFFIRMED.