IN THE COURT OF APPEALS OF IOWA

No. 5-678 95-306

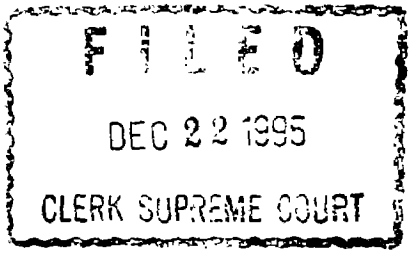
WILMER CLINGAN,

Petitioner-Appellant,

vs.

LOUIS RICH COMPANY and ITT HARTFORD INSURANCE GROUP,

Respondents-Appellees.



Appeal from the Iowa District Court for Keokuk County, Richard J. Vogel, Judge.

Petitioner appeals from the district court's ruling on judicial review affirming the industrial commissioner's denial of his workers' compensation claim. **AFFIRMED.**

Michael E. Sheehy, Cedar Rapids, for appellant.

Harry W. Dahl, Sr. of Harry W. Dahl, P.C., Des Moines, for appellees.

Heard by Sackett, P.J., Cady, J., and McCartney, S.J.*

* Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

SACKETT, P.J.

The sole question in this appeal from the denial of petitioner-appellant Wilmer Clingan's claim for worker's compensation benefits is whether there was substantial evidence supporting the industrial commissioner's decision Clingan's claim was barred because the employer, respondent-appellee Louis Rich Company, did not have notice or knowledge of the alleged injury as required by Iowa Code section 85.23 (1995).

Clingan was employed by Louis Rich Company from September 1988 through June 1990. He first worked as a security guard and, in September 1989, he was transferred to the trim line. Clingan stood in the line. The turkey came to him and he held it in his left hand and cut it with a knife held in his right hand.

While working at Louis Rich Company, Clingan also raised exotic animals and admitted carrying heavy hay bales and buckets, mowing the lawn, and doing other farm chores. However, Clingan claimed he was injured because the wire mesh glove he wore on the job at Louis Rich Company was too small.

On October 21, 1991, Clingan filed a contested worker's compensation claim with the Iowa industrial commissioner claiming to have suffered a cumulative injury to the cervical spine, left shoulder, and left arm on February 1, 1990.

The employer contended the claim was barred because it did not have notice or actual knowledge of the injury within ninety days. The employer contended one or the other was required under Iowa Code section 85.23.

The deputy commissioner determined it was uncontested there was no notice given to the employer. The deputy commissioner considered Clingan's claim the employer had actual knowledge and was or should have been aware of the injury. The deputy commissioner found the facts did not support Clingan's contention and dismissed the claim.

Clingan appealed to the commissioner who affirmed the deputy and to the district court who did the same. This appeal follows.

Clingan contends the commissioner's decision is not supported by substantial evidence.

Section 85.23 of the Code provides:

> Unless the employer or his representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on his behalf or a dependent or someone on his behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

Iowa Code § 85.23 (1995). The burden of proving the above section is applicable is on the employer. *See DeLong v. Iowa State Highway Comm'n*, 229 Iowa 700, 718-19, 295 N.W. 91, __ (1940) (Richards, C.J., and Oliver, J., dissenting on another issue).

The only issue before us is whether the decision of the commissioner was supported by substantial evidence when the record is viewed as a whole. *See Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights*

Comm'n, 394 N.W.2d 375, 379 (Iowa 1986); *Hussein v. Tama Meat Packing Corp.*, 394 N.W.2d 340, 341 (Iowa 1986).

In February 1990, Clingan was off work for several weeks because of problems with his neck and left arm. He thought he had the flu. Clingan never reported to his supervisor he had a work-connected condition to his cervical spine, left shoulder, and left arm from repetitive labor in the trim room. Clingan complained he had the flu in his shoulder and arm. Clingan's medical bills for this period were submitted to and paid by the group health insurance plan as nonoccupational injuries. Other company personnel testified they had responsibility for worker's compensation claims and they had no information concerning any injury Clingan received on the job.

There was evidence the first notice the company had of the claim was when it received the petition in October 1991.

Clingan contends certain references made as to complaints and treatment in the company medical records show the company knew or should have known and the only conclusion that can be drawn from this record is the company knew. We have considered those notations and disagree. The notations do not establish an injury.

We affirm.

AFFIRMED.