IN THE COURT OF APPEALS OF IOWA

No. 7-073 / 96-238

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DEBBIE ELLIS,
Petitioner-Appellee,
vs.
LIBERTY MUTUAL INSURANCE COMPANY and LUMBERMANS CASUALTY COMPANY,
Respondents-Appellants,
and
SECOND INJURY FUND OF IOWA
Respondent.

FILED
MAY 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Employer and its insurance carrier (respondents) appeal the district court's order reversing the Industrial Commissioner's grant of summary judgment in their favor. **AFFIRMED.**

Joseph S. Cortese II and Patrick D. Smith of Huber, Book, Cortese, Happe & Brown, P.L.C., Des Moines, for appellants.

Steven C. Jayne, Des Moines, for appellee.

Heard by Habhab, C.J., Sackett, and Cady, JJ.

CADY, J.

This appeal follows the judicial review of a decision by the Industrial Commissioner. The commissioner granted summary judgment. The district court reversed the commissioner. We affirm the district court on our review.

Debbie Ellis worked for Liberty Mutual Insurance Company from 1987 to 1991. She principally worked as a computer programer. In March 1991 Ellis began to experience pain and numbness in her right arm, hand and wrist. She sought medical treatment and was temporarily relieved from her work duties. She returned to work in April, but her symptoms also returned. She was again relieved of her work and sought additional medical treatment.

Ellis returned to work on June 14, 1991 with directions from her doctor to only use her left hand. She subsequently complained of pain in her left hand on two occasions. A first report of injury was prepared on July 5, 1991 and Ellis returned to her doctor. Medical treatment was unable to resolve her problems and her doctor recommended Ellis find employment that did not involve repetitious use of her fingers and wrists.

Ellis received temporary total disability payments during her absences from work. These benefits were paid from April 2, 1991 to April 7, 1991; April 10, 1991 to June 16, 1991; and July 5, 1991 to September 10, 1991. The benefits were terminated on September 10, 1991 after Ellis' doctor determined she had reached

maximum medical improvement. Ellis was advised of her right to file a claim for benefits.

Ellis filed three petitions for arbitration, alleging injury dates of March 18, 1991, March 29, 1991, and April 18, 1991. She was later awarded benefits for the injuries to her right upper extremity. No benefits were awarded for injuries to her left upper extremity because Ellis did not manifest left arm symptoms until June 20, 1991.

On September 2, 1994 Ellis filed another petition with the Industrial Commissioner alleging an injury to her left wrist and arm on June 20, 1991. The employer moved for summary judgment, alleging the petition was not filed within the two-year limitation period set forth in Iowa Code § 85.26(1).

Ellis responded to the request for summary adjudication by asserting her claim fell within the three-year limitation period set forth in Iowa Code § 85.26(1). The commissioner found as a matter of law the three-year limitation did not apply because no weekly benefits were ever paid to Ellis based on her claim of injury to her left hand on June 20, 1991. On judicial review, the district court reversed the commissioner. It found the facts were in dispute concerning the issue whether the benefits Ellis received from July 5, 1991 to September 10, 1991 were for both arms or only for the right arm.

Review of a decision by the Industrial Commissoner is for correction of errors at law. *Noble v. Lamoni Products*, 512 N.W.2d 290, 292 (Iowa 1994). To sustain a motion for summary judgment, the record must show no genuine issue of material fact

and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c).

Iowa Code § 85.26(1) requires a claimant to file a petition for workers' compensation benefits within two years of the injury date. However, if weekly benefits have been paid under section 86.13 for a temporary or permanent disability caused by a work-related injury, the limitation period is extended to three years from the date of the last payment. Iowa Code § 85.26(1).

In this case, Ellis failed to file her petition within two years of the date she claims she injured her left arm and wrist. She asserts, however, the three-year limitations period was satisfied because she received weekly compensation benefits for the injury until September 10, 1991. Thus, the dispositive question is whether the weekly benefits received by Ellis until September 10, 1991 were, as a matter of law, solely due to the injury to her right extremity. If the benefits were not paid for the claimed injury to her left upper extremity, the petition was untimely.

We acknowledge a limitation of action defense may be raised by motion for summary judgment. *Shahl v. Preston Mut. Ins. Ass'n*, 517 N.W.2d 201, 202 (Iowa 1994). However, disputed issues of material fact bearing on the question whether a statute limits a plaintiff's right of action are to be decided by the fact finder. *See Borchard v. Anderson*, 542 N.W.2d 247, 249 (Iowa 1996) (issue of whether a person is mentally ill for purposes of following statute of limitations is factual). Thus, a

statute of limitation defense is decided as a matter of law only when the facts are undisputed.

We agree with the district court that a factual dispute exists whether the weekly benefits paid until September 10, 1991 represented payments for injuries to both upper extremities or were only limited to the injury to the right upper extremity. The claims representative for the insurance carrier who authorized the payment of benefits testified the benefits were paid for the injury to the right extremity. However, she also testified she received information prior to authorizing the payments indicating Ellis was beginning to experience problems with both hands. It is reasonable to infer under all the circumstances the decision to pay benefits included the claim of injury to the left hand and arm. We believe a material factual dispute was generated, which precludes summary judgment.

We conclude the case must be remanded to the Industrial Commissioner to resolve the factual dispute following a hearing. It was improper to resolve the factual dispute in the context of a motion for summary judgment. We have considered all the issues raised and affirm the district court.

AFFIRMED.