IN THE COURT OF APPEALS OF IOWA

No. 3-421 / 92-1471

FILED
OCT 28 1993
CLERK SUPREME COURT

RANDY ELLIS,

Claimant Appellee,

vs.

B & B DISTRIBUTING CO., Employer,
and **CIGNA INSURANCE COMPANY**, Insurance Carrier,

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Respondents-Appellants.

Appeal from the Iowa District Court for Webster County, Newt Draheim, Judge.

Respondents appeal from the district court decision on judicial review reversing the Industrial Commissioner's decision denying workers' compensation benefits and reinstating the Deputy Commissioner's decision awarding the claimant healing period benefits and permanent partial disability benefits. **WE AFFIRM THE INDUSTRIAL COMMISSIONER AND REVERSE THE DISTRICT COURT.**

Charles E. Cutler and Coreen K. Bezdicek of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, for appellants.

Blake Parker of Parker & Fors, Fort Dodge, for appellee.

Heard by Schlegel, P.J., Oxberger, C.J., and Sackett, JJ. Donielson and Habhab, JJ., take no part.

PER CURIAM

B & B Distributing Co., employer/appellant appeals a district court decision finding there was not substantial evidence supporting the Industrial Commissioner's decision denying healing period benefits and reinstating a decision of a Deputy Industrial Commissioner providing benefits. We find there is substantial evidence supporting the Industrial Commissioner's decision. We reverse the district court and affirm the Industrial Commissioner.

There is evidence from which a fact finder could find that in January 1985, claimant/appellee Randy Ellis was a salaried employee of B & B. On January 31, 1985, Ellis was involved in a car accident while delivering a customer's television to their home. Ellis claimed injuries resulting from the accident. Ellis went to the emergency room at Trinity Hospital. The emergency room records reflect Ellis complained of pain in the mid-back which radiated into the right shoulder. Ellis was diagnosed as having an acute muscle strain.

Ellis was under the care of Dr. Jesse Landhuis, who kept him off of work until February 12, 1985. Dr. Landhuis's clinical records of Ellis's visit on February 11, 1985 indicate Ellis said he had less pain. The doctor released Ellis to return to work.

Ellis returned to work and worked full-time putting in six-day weeks. On June 3, 1985, Ellis was seen by Dr. Hayne and underwent a neurological examination. The

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results were within normal limits. A cervical myelogram was also performed. It was normal. Dr. Hayne was unable to find any etiology of Ellis's pain, a finding was corroborated by Dr. Yee, with the Department of Neurology at the University of Iowa Hospitals. Ellis maintained a full-time work schedule until April 16, 1987, when he had a car accident that was not work-related.

Following the April 1987 accident, Ellis stayed away from work. Dr. Landhuis found he had a cervical strain secondary to the January 1985 accident with additional cervical strain from the April 1987 accident. Dr. Landhuis found Ellis suffered a lumbar strain from the April 1987 accident. Dr. Landhuis released Ellis to return to work without restrictions beginning November 9, 1987. Ellis had told his doctor he was 100 percent better and had no pain.

In January 1988, Ellis began working full-time for a construction company doing sheetrock work, installing roofs and laying concrete.

When Ellis sought benefits, a Deputy Industrial Commissioner ordered B & B to pay Ellis for fifty weeks of permanent partial disability and healing period benefits from May 4, 1987 through November 8, 1987 at the stipulated weekly rate. B & B appealed this arbitration decision to the Iowa Industrial Commissioner who reversed the decision of the Deputy finding the claimant was to take nothing because Ellis failed to prove by a preponderance of the evidence a causal connection between his work-related

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accident and the period of time from May 4, 1987 through November 9, 1987.

Ellis appealed from the Industrial Commissioner's decision and, on appeal to the district court, the district court reversed the Industrial Commissioner's decision and reinstated the Deputy Industrial Commissioner's decision. B & B filed a motion for reconsideration pointing out that when the court judgment and judicial review stated, "There is substantial evidence in the whole record to support the conclusion of the Deputy Industrial Commissioner". B & B contended this was in conflict with the current status of the law. The district court in a ruling on the motion to reconsider amended the language of the original order to state, "The Court concludes that there is not substantial evidence in the record as a whole to support the conclusion of the Industrial Commissioner." Prior to ruling on the motion to reconsider, B & B filed a notice of appeal. B & B contends the trial court did not have jurisdiction to rule on the motion after its notice of appeal was filed. This is an issue we need not and do not address.

B & B contends the district court applied the wrong standard of review. Ellis contends the district court did not but, if it did, it should be affirmed because the standard should be changed.

It is clearly established we review to determine whether the Commissioner's findings were supported by substantial evidence. The standard for review in this case

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is limited to an inquiry into whether there is substantial evidence in the record as a whole to support the agency's decision. Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n, 394 N.W.2d 375 (Iowa 1986). Judicial review by an appellate court of an agency decision is limited to correcting errors of law and is not de novo review. See Iowa R. App. P. 4; Geiken v. Lutheran Home For The Aged Ass'n, 468 N.W.2d 223, 225 (Iowa 1991). B & B's appeal is based on whether substantial evidence in the record viewed as a whole supports the Industrial Commissioner's decision.

If the Commissioner's findings of fact are supported by substantial evidence in the record, the Commissioner's decision will not be overturned by the court. Ward v. Iowa Dep't of Transp., 304 N.W.2d 236, 238 (Iowa 1981).

The Deputy Industrial Commissioner's decision is considered only a proposed decision within the contemplation of Iowa Code section 17A.15(2). Tussing v. George A. Hormel & Co., 461 N.W.2d 450, 451-52 (Iowa 1990). The Industrial Commissioner assumes full responsibility for deciding anew all issues of fact and law. Id.

The Industrial Commissioner reviews the decision under de novo review. See Iowa Code § 17A.15(3) (1991). When reviewing a proposed decision, the agency has all the power it would have in initially making the final decision except as it may limit the issues on notice to the parties or by

rule. Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n, 322 N.W.2d 293, 294 (Iowa 1982).

Ellis has the burden of proof to establish the injury for which he seeks compensation arose out of and in the course of employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 405, 68 N.W.2d 63, 65 (1955). An injury arises out of the employment where there is a causal connection between the condition under which the work is performed and the resulting injury. See Musselman v. Central Tel. Co., 154 N.W.2d 128, 132 (1967).

It is uncontroverted Ellis's second injury on April 16, 1987 neither arose out of or occurred in the course of employment with B & B. From February 11, 1985, until the second accident in April 1987, a period of almost two and one-half years, Ellis was working full-time.

During two and one-half years, Ellis maintained an excellent attendance record. Ellis never indicated to his employer during those two and one-half years that he was not able to perform a job due to his physical condition. He did all required work and had no written work restrictions from his treating physician.

There is substantial evidence to support a finding the cause of Ellis's inability to work following his second car accident on April 16, 1987 was not work related. We affirm the Industrial Commissioner and reverse the district court on this issue.

WE AFFIRM THE INDUSTRIAL COMMISSIONER AND REVERSE THE DISTRICT COURT ON THIS ISSUE.