IN THE COURT OF APPEALS OF IOWA

No. 1-213 / 00-1606
Filed June 29, 2001

TOM WEIDA, Claimant,
Plaintiff-Appellant,

vs.

RANDOLPH'S INC., Employer,
and GREAT WEST CASUALTY,
Insurance Carrier,
Defendant-Appellee.

FILED
JUN 29 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Petitioner appeals from the district court's ruling on judicial review affirming the decision of the deputy commissioner and commissioner denying his claim for workers' compensation benefits. **AFFIRMED.**

Michael T. Jalovec and James A. Sinclair of Sinclair & Associates, P.C., West Des Moines, for appellant.

Saffin Parrish of Huber, Book, Cortese, Happe & Brown, P.L.C., Des Moines, for appellee.

Heard by Sackett, C.J., Huitink and Streit, JJ.

SACKETT, C.J.

Appellant Tom Weida appeals the district court's decision affirming the workers' compensation commissioner's finding that the appellant did not meet his burden to show he suffered an injury arising out of and in the course of his employment on November 20, 1996. Appellant claims on appeal that the workers' compensation commissioner's finding that he had not established an injury was not supported by substantial evidence and that the commissioner and district court committed an error at law by not applying the cumulative injury rule. We affirm.

Appellant Tom Weida was hired as a truck driver by appellee Randolph's, Inc., in September of 1982. On February 2, 1993, appellant slipped on the ice while delivering fuel for Randolph's and injured his right elbow. In May of that year appellant received chiropractic care to treat the upper back pain and left arm/hand weakness he suffered as a result of that fall.

On November 20, 1996 appellant claims he injured his neck while pulling hoses from his gasoline tanker-trailer for purposes of pumping gas during a delivery. As part of his job delivering fuel, appellant is required to both fill his tanker-trailer and pump fuel out it. When pumping fuel appellant must take two thick rubber hoses off of the truck, attach one end to the tanker-trailer, and attach another end to a tank in the ground. These rubber hoses are four inches in diameter, twenty feet long, and weigh approximately twenty-five pounds each. After filling the ground tanks with gas appellant must detach the hose from the tanker-trailer, roll up the hose, detach the hose from the ground tank, and then load the hoses back on the tanker-trailer. During cold months maneuvering

these hoses becomes more difficult because they are much stiffer. On November 20, 1996, the day appellant claims on appeal he was injured, he contends he was pulling hoses off of his tanker-trailer to assist in a fuel delivery when he felt an intense pain in his neck radiating into his left arm, weakening it. Appellant testified that on the same day he called Sue Nachazel at Randolph's, informed her of his work-related neck injury, and asked her to set up an appointment for him with a chiropractor. Ms. Nachazel scheduled an appointment for appellant with a Dr. Storjohann. Storjohann reported after examining appellant that appellant had been experiencing pain for about a week. Storjohann's report contained no reference to a particular work-related incident which may have caused that pain. Appellant did not fill out a written accident report regarding the alleged November 20 incident, nor did he indicate to Storjohann that he was in the office for a work-related injury. Appellant next consulted the company doctor, Dr. Kirkle, also through Nachazel. Kirkle noted that on approximately November 20, 1996, appellant's arm had begun to get tingly and hurt, but again, there was no indication that a specific work-related injury had occurred on that date. Kirkle referred appellant to Dr. Chung, who noted on December 9, 1996, that appellant had neck problems beginning in mid-November. During his appointment with Chung, appellant checked a box on one of Chung's forms indicating that his injury was due to a work-related accident. On Chung's forms appellant stated that his symptoms resulted from a work injury on November 20, 1996, but also indicated that his symptoms began on *September* 20, 1996. Chung referred appellant to Dr. Szymke, who on

December 12, 1996, reported appellant's current injury was due to the work-related incident on November 20, 1996.

On December 16, 1996, when the workers' compensation carrier interviewed appellant and asked what the cause of his current problem was, he made no reference to the November 20, 1996 incident.

Defendant claims on appeal that the commissioner's ruling that he had not established a work-related injury occurring on November 20, 1996 is not supported by substantial evidence. Our review of workers' compensation commission decisions is governed by the Administrative Procedure Act, Iowa Code chapter 17A. *Dico, Inc., v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 354 (Iowa 1998). We will grant relief where substantial rights of the party have been prejudiced because the agency action is in excess of the agency's statutory authority, is unsupported by substantial evidence, is unreasonable, arbitrary, or capricious, or is affected by other error at law. *Id., See* Iowa Code § 17A.19(8) (1995). When reviewing the decision of the district court we must determine whether the district court properly applied the law. In reviewing its decision we apply the standards of section 17A.19 to the agency action and determine whether our conclusions are the same as the district court's. *Bearce v. FMC Corp.*, 465 N.W.2d 531, 534 (Iowa 1991). The question on review is not whether the evidence might support a different finding but whether the evidence supports findings the commissioner actually made. *Ward v. Iowa Dept. of Transp.*, 304 N.W.2d 236, 237-8 (Iowa 1981). The substantial evidence test is applied to the entire record; evidence is substantial if a reasonable mind would accept it as

adequate to reach a conclusion. *Iowa State Fairgrounds Sec. v. Iowa Civil Rights Com'n.*, 322 N.W.2d 293, 295-6 (Iowa 1982).

We conclude that the commissioner's decision to deny appellant his claim that his injury arose out of a work-related incident occurring on November 20, 1996, was supported by substantial evidence. The commissioner concluded that the appellant had failed to meet his burden by showing by a preponderance of the evidence that the alleged injury occurred and that it arose out of and in the course of employment. *McDowell v. Town of Clarksville,* 241 N.W.2d 904 (Iowa 1976). As evidence of appellant's failure to meet the burden of proof, the commissioner cited the inconsistencies in the record regarding whether a separate injury occurred after the ice injury in 1993, and when that second injury, if it occurred, did occur. The commissioner also noted the failure of medical records to contain references to a specifically work-related incident occurring on November 20, 1996 as even the suspected cause of pain the patient was suffering at the time of medical examination. The commissioner concluded from these inconsistencies and omissions that appellant had not met his burden of proof. The district court affirmed this decision.

We agree with the district court that the commissioner's decision is supported by substantial evidence. Appellant gave no indications he received a work-related injury to Drs. Storjohann or Kirkle. Appellant gave conflicting reports to Dr. Chung, and it was only to Dr. Szymke almost a month after the incident that he pinpointed his pain as having had a November 20, 1996 origin. To three out of the four doctors he saw, appellant failed to make a statement about a November 20 work incident which he is now claiming occurred. There is

substantial evidence supporting the denial of relief for an alleged work-related injury on November 20, 1996.

We do not address appellant's claim the commissioner and the district court erred in not applying the cumulative injury rule. Appellant failed to raise the issue of cumulative injury at the administrative hearing or on judicial review before the trial court. Cumulative injury is a distinct claim of recovery. *See McKeever Custom Cabinet v. Smith,* 379 N.W.2d 368 (Iowa 1985). Although "cumulative injury" is indicated on appellant's petition and prehearing conference report, there is no indication from the record that this issue was argued at the administrative hearing nor was it raised in the district court. Claims not raised at the hearing may not be argued before us for the first time. *Armstrong v. State of Iowa Bldgs. & Grounds,* 382 N.W.2d 161, 167 (Iowa 1986). This issue has not been preserved for our review.

AFFIRMED.