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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

No. 0-444 / 89-1648

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**KAY KONZ,**

Appellant,

vs.

**UNIVERSITY OF IOWA and STATE OF IOWA,**

Appellees.

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Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Employee appeals a judgment affirming a decision of the Industrial Commissioner which upheld an order dismissing employee's claim against employer. **REVERSED AND REMANDED.**

John W. Kocourek of Peterson Law Offices, Council Bluffs, for appellant.

Bonnie J. Campbell, Attorney General, and Dean A. Lerner, Assistant Attorney General, for appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

**SCHLEGEL, J.**

Petitioner-appellant Kay Konz appeals a district court judgment affirming a decision of the Industrial Commissioner. The Industrial Commissioner's decision upheld a deputy commissioner's order dismissing without prejudice Konz's medical benefits claim against the University of Iowa and the State of Iowa. The deputy commissioner dismissed the claim after Konz's attorney failed to appear at a prehearing conference and failed to respond to an order to show cause. Both the deputy commissioner and the Industrial Commissioner rejected Konz's motions for reconsideration and reinstatement. We reverse and remand for further proceedings.

On March 21, 1983, Konz was injured in a traffic accident while traveling with co-workers to a work-related symposium.[1] Konz suffered head injuries. On March 19, 1985, she filed a claim for permanent partial disability against her employer, the University of Iowa, and its insurance carrier, the State of Iowa. Konz received weekly benefits and medical payments.

Konz's attorney, Walter M. Calinger, filed the petition before the Industrial Commissioner. Throughout the proceedings, both the commissioner and the State sent correspondence and notices to Calinger's Red Oak Office.

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1. Konz unsuccessfully prosecuted a civil suit for gross negligence against a co-worker who was operating the vehicle. Konz v. Ehly, 451 N.W.2d 504 (Iowa App. 1989).

According to his affidavit, Calinger had reached an agreement with an assistant attorney general that little would be done in this action while Konz's civil suit was pending. The record shows that the claim was placed on inactive status for six months "pending a civil case" by an order filed July 13, 1987. Seven months later, in February 1988, the next action the commissioner's office took was to notify the parties that the claim was subject to dismissal for lack of prosecution. Calinger filed a response indicating that discovery was not complete and that the civil trial was scheduled for September 1988. The commissioner granted an extension of time, and a prehearing conference was scheduled.

Meanwhile, Calinger, who split time between Red Oak and Omaha, became mayor of Omaha in April 1988. On May 10, during a telephone prehearing conference, Calinger notified the deputy commissioner that the case would be referred to attorney David Hicks.

The commissioner's office scheduled prehearing conference for July 18, 1988. Neither Konz nor her counsel appeared. On July 28, Deputy Commissioner Dubik entered an order requiring Konz to show cause within twenty days why the matter should not be dismissed. The record shows that Deputy Commissioner Dubik was at least the fourth deputy to take action in the case.

The order to show cause entered by Deputy Commissioner Dubik notes only that the commissioner had sent notice of

automatic dismissal in February and that prehearing conferences had been set. Although the order indicates that a prehearing conference was not held, it appears that it may have been conducted by telephone. The order concludes: "Claimant's original notice and petition has [sic] been on file with this agency in excess of three years and the matter is not presently scheduled for hearing. Counsel appears to have a clear disregard for the proceedings of this agency."

After Hicks agreed to take the case, Calinger sent his files to Hicks, apparently minus the show cause order. Calinger failed to have the mail for the Konz claim sent from his Red Oak office to Hicks's Omaha office. Hicks remained unaware of the July 28 show cause order when he filed an appearance on August 15. In the confusion, neither Calinger nor Hicks responded to the Order to Show Cause.

Deputy Commissioner Dubik dismissed the claim on September 7. The dismissal was entered pursuant to 343 Iowa Administrative Code section 4.36, which states in relevant part:

> **Compliance with order or rules.** If any party to a contested case or an attorney representing such party shall fail to comply with these rules or any order of a deputy commissioner or the industrial commissioner, the deputy commissioner or industrial commissioner may dismiss the action. Such dismissal shall be without prejudice. . . .

On September 15, Hicks and Calinger filed a motion on behalf of Konz for reconsideration of the dismissal order.

Among other things, they urged reconsideration on the grounds of excusable neglect citing the transfer of the case from Calinger to Hicks and Calinger's assumption of mayoral duties. They noted the harshness and inequity of dismissal. Deputy Commissioner Dubik denied the motion on September 23, stating: "Ample opportunity was given to respond. Cause does not exist to reconsider the order . . . ." The Industrial Commissioner affirmed this decision.[2] The district court also affirmed, stating that there was substantial evidence to support its ruling.

This appeal results from a contested case state agency proceeding. See Iowa Code § 17A.2(2) (1989). In contested case proceedings, the agency, rather than the district court, is empowered to hear evidence and make findings of fact. Iowa Code § 17A.19(7) (1989). The district court, when exercising the power of judicial review over agency action, is functioning in an appellate capacity to correct errors at law. Iowa Code § 17A.19(8) (1989); Kohorst v. Iowa State Commerce Comm'n, 348 N.W.2d 619, 621 (Iowa 1984). Our review of the district court's decision is limited to correction of errors of law. Roberts v. Iowa

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2. Claimant also filed a motion for reinstatement pursuant to 343 Iowa Administrative Code section 4.34. As we discuss further below, section 4.34, titled "Dismissal for lack of prosecution," is the functional equivalent of Iowa Rule of Civil Procedure 215.1. We agree with the State that this rule could have been, but was not, invoked by the agency. Consequently, the mandatory reinstatement provision in section 4.34(3) cannot be applied here, and the agency properly found it inapplicable.

Dep't of Job Serv., 356 N.W.2d 218, 221 (Iowa 1984). We, like the district court, are bound by the agency's fact findings if those findings are supported by substantial evidence. Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. Eaton v. Iowa Dept. of Job Service, 376 N.W.2d 915, 916-17 (Iowa App. 1985). The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. Henry v. Iowa Dept. of Job Service, 391 N.W.2d 731 (Iowa App. 1986). The fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. Id.

The Industrial Commissioner adopted our rules of civil procedure to govern contested case proceedings. 343 Iowa Admin. Code § 4.35. The district court apparently found that agency rule 4.36 (compliance with order or rules) applied. The court looked to case law for civil procedure rule 215.1 (dismissal for want of prosecution) for guidance. This was inappropriate because civil procedure rule 215.1 is almost identical to agency rule 4.34, which also provides for dismissal for lack of prosecution. As the State has so aptly and repeatedly pointed out, agency rule 4.34 does not apply in this case because the agency did not invoke it. "Because the stakes are high, and the results harsh, the formalities prescribed to implement the

rule 215.1 procedure must be strictly observed." Green v. Tri-County Community School Dist., 315 N.W.2d 779, 782 (Iowa 1982) (citing Seela v. Haye, 256 Iowa 606, 610, 128 N.W.2d 279, 280 (1964)). There is no doubt that rule 4.34 procedures were not implemented, and even the district court recognized that there was no evidence that the requirements were completed. Because agency rule 4.34 was not implemented, we think it inconsistent and inappropriate to apply its equivalent civil procedure rule, rule 215.1, to the detriment of the claimant when the strict procedures of those rules have not been followed.

As the supreme court pointed out in Green v. Tri-County Community School District, when rule 215.1 never comes into operation, it should not be considered because "[a]ll that is left is a judgment of dismissal." 315 N.W.2d at 782. Given that the statute of limitation had run, claimant was faced with a default judgment. See Iowa R. Civ. P. 230 (defining "default" as failing "to comply with any order of court"). Iowa Rule of Civil Procedure 236 provides that "[o]n motion and for good cause shown, . . . the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty."

Although the agency has discretion in ruling on motions to set aside a default, we will reverse upon a showing of abuse of discretion. Whitehorn v. Lovik, 398 N.W.2d 851, 853 (Iowa 1987); Svoboda v. Svoboda, 245 Iowa 111, 119, 60

N.W.2d 859, 864 (1953). We will find an abuse when there is a lack of substantial evidence supporting the ruling, but if there is no factual issue we are not bound by the determination of the agency. Whitehorn, 398 N.W.2d at 853; Dealers Warehouse Co. v. Wahl & Assocs., 216 N.W.2d 391, 394 (Iowa 1974). While the parties' characterizations of the facts differ, the facts, the actual chain of events, here are not disputed, and we are left with the issue of whether, as a matter of law, the deputy commissioner erred in concluding that there was no mistake, inadvertence, or excusable neglect. Whitehorn, 398 N.W.2d at 853.

Since Svoboda v. Svoboda, 245 Iowa 111, 118, 60 N.W.2d 859, 863 (1953), Iowa courts have recognized that "'good cause' is a sound, effective, and truthful reason. It is something more than an excuse, a plea, apology, extenuation, or some justification, for the resulting effect." In so doing, some cases have discussed the movant's diligence and good faith. Gordon v. Gordon, 200 N.W.2d 527, 528 (Iowa 1972).

Having reviewed the record in a light most favorable to the movant, Handy v. Handy, 250 Iowa 879, 885, 96 N.W.2d 922, 926 (1959), we can only conclude that the agency abused its discretion. Whitehorn, 398 N.W.2d at 853. The deputy commissioner blurred the distinction set out in Svoboda between sound reasons and mere excuses. Id. The agency was clearly preoccupied with the entire history of the proceedings before the agency and the delay in

prosecuting the claim, but it ignored the various reasons for keeping the case inactive. The order to show cause dwells only briefly on the purpose for its issuance, failure to appear, but draws on a limited view of the procedural history of the claim to make the bald assertion that "[c]ounsel appears to have a clear disregard for the proceedings of this agency."

Likewise, the district court, after applying the incorrect standard, was preoccupied with the history of proceedings before the agency. The district court ignored the stated reason for dismissal, choosing instead to find "substantial evidence" in the prior conduct of the case. Though concerned about the failure to prosecute the claim, the court, like the agency, ignored the existence of the pending civil case and the fact that much of the delay in prosecuting the claim was with the permission of the agency.

The supreme court has said that "rule 236 does not contemplate a blameless party; it contemplates that some fault actually exists." Whitehorn, 398 N.W.2d at 854 (citing First Nat'l Bank in Lenox v. Claiser, 308 N.W.2d 1, 3 (Iowa 1981) (Uhlenhopp, J., dissenting)). Although we reverse the agency ruling, we do not condone delay or poor case management. See Green, 315 N.W.2d at 782. Nevertheless, we are persuaded that the inconvenience and delay caused to the resisting party "must give way to the greater right of the litigant who personally is not

negligent, to have his case decided on its merits, especially when the sole neglect resulting in the default and judgment is that of an attorney." Handy, 250 Iowa at 886, 96 N.W.2d at 927.

The agency abused its discretion in concluding that there was no good cause for sustaining the motion. The district court erred in affirming the agency. We must, therefore, reverse and remand to the industrial commissioner for further proceedings in accordance with this opinion.

**REVERSED AND REMANDED.**