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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

RIEKES EQUIPMENT COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier,	)	
Petitioners-Appellants,	)	Filed January 30, 1981
vs.	)	
ROBERT C. LANDESS, Iowa Industrial Commissioner, and SHELLIE JONES, Spouse of Ricky Dean Jones, Deceased,	)	0-314 2-64786
Respondents-Appellees.	)	

Appeal from Cerro Gordo District Court - M. L. Mason, Senior Judge.

Appellants appeal the trial court's affirmance of the Iowa Industrial Commission's order that they pay claimant's death benefits. AFFIRMED.

Jay P. Roberts of Swisher & Cohrt, Waterloo, for petitioners-appellants.

Tobin Swanson of Watson & Swanson, Des Moines, for respondents-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Appellants appeal the trial court's affirmance of the Iowa Industrial Commission's order that they pay claimant Shellie Jones death benefits. We affirm.

On November 8, 1977, at about 11:40 a.m. Ricky Jones, husband of Shellie Jones, was driving a truck in the course of employment, when the truck overturned and Ricky was killed. Claimant Shellie Jones subsequently petitioned the Iowa Industrial Commission for death benefits. After a full hearing the deputy industrial commissioner found that claimant sustained her burden of proving that decedent's death arose out of and in the course of his employment for appellant-employer, Riekes Equipment Company, and that appellants failed to prove by a preponderance of the evidence that intoxication was the proximate cause of decedent's death. In his arbitration decision, the deputy commissioner ordered appellants to pay claimant death benefits of $163.21 per week, funeral expenses, and to make a payment to the second injury fund in accordance with section 85.30, The Code 1979. On an intra-agency appeal the Iowa Industrial Commissioner affirmed the deputy's decision and adopted it as the agency's final decision. Appellants then filed a petition for judicial review in district court and the court affirmed the agency's decision.

An appeal from the determination of the district court is allowed under section 17A.20, The Code 1979. Hoffman v. Iowa Department of Transportation, 257 N.W.2d 22, 25 (Iowa 1977). Our review is limited to the record made before the deputy commissioner. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 176 (Iowa 1979). We uphold agency fact findings which are supported by substantial evidence in the record made before the agency when that record is viewed as a whole. Manning, 286 N.W.2d at 176. Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. Hawk v. Jim Hawk Chevrolet-Buick, Inc., 282 N.W.2d 84, 87 (Iowa 1979); City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311 (Iowa 1978). The entire record must be considered in determining whether the challenged finding has sufficient support. City of Davenport, 264 N.W.2d at 311. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. City of Davenport, 264 N.W.2d at 311 (quoting Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 488, 71 S. Ct. 456, 464-65, 95 L. Ed. 456, 467-68 (1951)). Nonetheless, the possibility of drawing two

inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. City of Davenport, 264 N.W.2d at 311. A reviewing court may not displace an agency's choice between two fairly conflicting positions, even though the court would justifiably have made a different choice had the matter been before it de novo. City of Davenport, 264 N.W.2d at 312 (quoting Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474, 488, 71 S. Ct. 456, 464-65, 95 L. Ed. 456, 467-68 (1951)).

I. Claimant is not entitled to benefits if decedent's death was proximately caused by his intoxication. See § 85.16(2), The Code 1979. The central issue on appeal is whether the deputy commissioner's decision is supported by substantial evidence. We conclude that it is.

The evidence that intoxication did not proximately cause decedent's death is as follows: Ricky was employed at Riekes Equipment Company in Des Moines, Iowa. On the morning of his death Ricky arrived at work at 7:30 a.m. Ricky's supervisor, Lyle Seward, saw him that morning but noted nothing unusual about his behavior. None of his co-workers who saw Ricky that morning reported to Seward any unusual behavior on Ricky's part. After his arrival at work Ricky proceeded to perform his typical duties. Ricky backed seven trucks outside and checked them to see if they needed maintenance. He loaded a four ton forklift onto a seven and one-half ton truck. At approximately 8:00 a.m. Ricky departed in the truck for Charles City, Iowa, to deliver the forklift. After he drove uneventfully for over 100 miles, at about 11:40 a.m., on county secondary road T-38, at at approximately seventeen miles east of Mason City and twelve miles west of Charles City, Ricky's truck overturned and Ricky was crushed to death. For about twenty to twenty-five minutes before Ricky's death, Garth Lovejoy monitored and participated in a C.B. radio conversation that included Ricky as a central speaker. During this conversation Lovejoy noticed no irregularities in Ricky's speech. When Lovejoy investigated the accident he smelled no alcohol nor did he see any containers of alcohol. When highway patrol officer Phillip L. Hohn physically removed and carried Ricky's body from the wreckage, he smelled no alcohol nor did he see any containers of alcohol. Neither Ricky's wife nor his supervisor were aware that Ricky would drink while working.

The evidence that intoxication did proximately cause Ricky's death is as follows: Ricky had been a heavy drinker, had gone to AA meetings, but had been consuming alco-

holic beverages for about six months prior to his death. At 2:00 a.m. on the morning of his death Ricky arrived home intoxicated, barely able to speak, and walking with difficulty. A chemist's tests performed on a blood sample taken from Ricky after his death showed a alcohol level of at least .216. There is no evidence that the accident was caused by bad weather or road or traffic conditions or mechanical problems. Officer Hohn testified that he has never seen anyone with a blood alcohol level in the vicinity of .216 that he thought was not intoxicated. Officer Hohn concluded that based on his investigation of the accident and knowledge of Ricky's blood alcohol level, the cause of the accident was Ricky's intoxication. Dr. W. P. Pelz, a physician, testified that someone with a .216 blood alcohol level has retarded reflexes, cannot think straight, has no judgment, and cannot operate a motor vehicle without untoward results. In answer to a hypothetical question based on the facts of the instant case, Dr. Pelz opined that intoxication caused the death of the hypothetical driver. Another physician, Dr. Gilbert R. Clark, a specialist in pathology, testified that anyone with a blood alcohol level of .216 is severely impaired. Dr. Clark opined that intoxication caused the death of hypothetical driver. Both Pelz and Clark testified that heavy or chronic drinkers can actually be intoxicated without so appearing.

The fact finder, in this case the deputy commissioner, has the duty of weighing and determining the credibility of conflicting evidence. Catalfo v Firestone Tire and Rubber Co., 213 N.W.2d 506, 509 (Iowa 1973). In its review of the record the district court found that the deputy commissioner relied upon the evidence presented relative to Ricky's conduct after he reported for work as being sufficient to rebut the issue of intoxication raised by the blood alcohol test. We agree there is substantial evidence to support this determination.

II. Appellants contend the deputy commissioner erred in excluding from evidence a beer can allegedly found in the cab of the truck driven by Ricky. The deputy commissioner's ruling was based on the ground that appellants failed to show a continuous chain of control over the beer can. We agree with the deputy commissioner.

Failure to account for continuous custody or to negative any reasonable probability of tampering with or substitution of evidence ordinarily calls for exclusion of the evidence. See State v. Bakker, 262 N.W.2d 538, 542 (Iowa 1978). However, in establishing a chain of custody adequate to justify admission of physical evidence, the

party seeking admission need only show circumstances making it reasonably probable that tampering, substitution, or alteration of evidence did not occur. See Bakker, 262 N.W.2d at 542-43.

Bill Shelley, an employee of Riekes Equipment Company, testified that the day after the accident he removed a sack from the truck, put it in a box, and brought the box back to Des Moines, where it was delivered to Liberty Mutual Insurance Company. Lyle Seward testified that he later received the box at the Riekes office, from which point he retained custody until the time of the hearing. The sack inside the box contains the beer can appellants sought to admit into evidence. Shelley testified that he did not see the contents of the sack when he salvaged it from the wreckage. No one from Liberty Mutual testified that the box was ever in its custody, or if it was, how the box was cared for. If we accept Shelley and Seward's testimony, then Liberty Mutual had custody of the box approximately from November 9, 1977, until July 10, 1978. Failure to present direct testimony accounting for the whereabouts of the box and circumstances of its storage for such a large expanse of time while allegedly in the hands of an obviously interested party is justifiably fatal to appellants' attempt to introduce the beer can into evidence. Nor do appellants offer any showing of circumstances making it reasonably probable that tampering, substitution, or alteration of evidence did not occur between Shelley and Seward's custody of the box.

Even assuming that the deputy commissioner erred in refusing to admit the beer can into evidence, the deputy's decision constituted harmless error. In appellants' brief filed with the Iowa Industrial Commission they admit, correctly, that evidence of a beer can in the cab is of immaterial weight in light of the evidence of Ricky's .216 blood alcohol level. A judgment should not be reversed and litigation prolonged unless error appears which we may reasonably suppose affected the result to the prejudice of the losing party. Baysinger v. Haney, 261 Iowa 577, 583, 155 N.W.2d 496, 499 (1968); McKlveen v. Townley, 233 Iowa 328, 331, 7 N.W.2d 186, 187 (1942).

AFFIRMED.