IN THE COURT OF APPEALS OF IOWA

No. 1999-96 (9-283) / 98-1623
Filed July 23, 1999

IBP, Inc.,

Appellant/Cross-Appellee,

vs.

RAAD AL-GHARIB,

Appellee/Cross-Appellant.

FILED
JUL 23 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, James W. Brown, Judge.

IBP appeals and Raad Al-Gharib cross-appeals a ruling on judicial review affirming an agency decision which awarded Al-Gharib workers' compensation benefits for permanent and total disability. **REVERSED AND REMANDED WITH DIRECTION ON APPEAL; CROSS-APPEAL DISMISSED.**

Christopher J. Godfrey, Dakota City, Nebraska, for appellant.

Mark W. Fransdal of Redfern, Mason, Dieter, Larsen & Moore, P.L.C., Cedar Falls, for appellee.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

300130

VOGEL, J.

IBP appeals and Raad Al-Gharib cross-appeals a ruling on judicial review affirming an agency decision which awarded Al-Gharib workers' compensation benefits for permanent and total disability. Because we find the industrial commissioner considered improper factors in determining the extent of Al-Gharib's disability, we reverse and remand with direction. We do not consider the issues raised in Al-Gharib's cross-appeal as we find they have been waived.

Factual and procedural history. On March 30, 1993, Al-Gharib commenced employment at IBP in Waterloo. His first job involved pulling intestinal casings on an assembly line using a vibrating knife. The work involved significant repetitive movement. In the fall of 1993, Al-Gharib began experiencing pain in his right side. His supervisor sent him to the dispensary where he was provided some lotion and tablets. Al-Gharib's pain continued, and he was subsequently sent to Occupational Health at Allen Hospital for evaluation. IBP also changed Gharib's work assignment to washing out the mouths of hogs with a hose. The doctors at Allen Hospital prescribed medication and treatment, and gave Al-Gharib a temporary work restriction of no use of the right arm. IBP thereafter assigned Al-Gharib to do indexing, which involved receiving hogs hanging on moving hooks and pushing or pulling them to the mail line. The work was in a cold area and Al-Gharib's pain continued. After Al-Gharib complained to his supervisors, he was returned to the hog area and given a job which required the use of both hands. Al-Gharib was later

transferred to work in another cold area, although the doctors at Allen Hospital had recommended that Al-Gharib not work in a cold environment. This final assignment also occasionally required the use of both hands. Al-Gharib finally quit his employment on April 5, 1994.

In March of 1995, Raad Al-Gharib filed a workers' compensation action against IBP seeking disability benefits for the physical injury he suffered at work and a mental injury (depression) which he claimed was casually connected to his physical injury. The deputy industrial commissioner found that Al-Gharib was entitled to permanent and total disability benefits. The deputy further found that Al-Gharib's depression was causally connected to his work injury, and concluded that IBP was responsible for his mental health expenses. The industrial commissioner determined Al-Gharib was entitled to permanent and total disability benefits, but found there was no casual connection between his depression and his work injury. Both IBP and Al-Gharib sought judicial review. On August 4, 1998, the district court entered a ruling affirming the disability finding. The court determined that it was unnecessary to address the mental injury issue in light of its ruling.

On August 15, 1998, Al-Gharib filed a "Motion for Reconsideration of Cross-Appeal," asking the court to address the mental injury issue. On September 1, 1998, the district court judge informed the parties that he would issue a ruling on the motion when he returned from vacation. However, on September 3, 1998, before any ruling was filed, IBP filed a notice of appeal. Al-Gharib filed a notice of cross-appeal on

September 8, 1998. On October 13, 1998, the district court entered a ruling on the motion for reconsideration which ordered that the case be remanded to the industrial commissioner. There is some question as to whether or not the parties ever received a copy of this order. The original order does not indicate whether copies were sent to the parties, and the parties did not refer to the order in their briefs nor at oral argument. The procedural history of this case prompts this court to first consider whether IBP's appeal is interlocutory and whether we have jurisdiction over this matter.

I. Jurisdiction. Every court has inherent power to determine whether it has jurisdiction of the controversy before it. *City of Des Moines v. Des Moines Police Bargaining Unit Assoc.*, 360 N.W.2d 729, 730 (Iowa 1985). Jurisdiction of a proceeding cannot be conferred by waiver or consent, and courts have a duty to refuse on their own motion to decide controversies that are not properly before them. *See Id.* (citations omitted). When we determine we are without jurisdiction, an appeal must be dismissed even though neither party has moved for it. *See Recker v. Gustafson*, 271 N.W.2d 738, 739 (Iowa 1978).

When a rule 179(b) application is pending prior to the taking of an appeal, the decree to which it is addressed becomes in effect interlocutory until the trial court rules upon the application. *Id.* at 739. Such an appeal is premature, deprives us of jurisdiction and should be dismissed. *See id.* at 739-40. Dismissal is required only when it is the non-moving party who files a notice of appeal prematurely. *See id.*

Should the moving party file a notice of appeal prior to their motion being ruled on, that party necessarily waives and abandons its motion and any appeal of the issues within. *See id.*

In the case before us, IBP's notice of appeal was clearly interlocutory as the trial court had not yet ruled on the motion to reconsider. While Al-Gharib likely felt compelled by Iowa Rule of Appellate Procedure 5(a) to file his notice of cross-appeal within five days of the filing of IBP's notice of appeal, doing so waived the issues raised in his motion. *See id.* Instead, Al-Gharib should have filed a motion to dismiss the appeal, or asked our supreme court for a limited remand to allow the district court to enter a ruling on its motion. *See* Iowa R. App. P. 23(a); Iowa R. App. P. 12(g); *Wolf v. City of Ely*, 493 N.W.2d 846, 848-49 (Iowa 1992). His decision to file a cross-appeal prevents us from addressing the very issue he raises therein. At the same time, Al-Gharib's abandonment of his motion to reconsider cures the prematurity of IBP's appeal. Although IBP's appeal was initially interlocutory, we now consider it to be from a final judgment.[1]

II. Disability award. IBP claims that substantial evidence does not support an award of total and permanent disability benefits.

We review district court decisions regarding the validity of agency actions for correction of errors at law. *U.S. West Communications, Inc. v. Overholser*, 566

[1] The filing of the notice of appeal and cross-appeal necessarily deprived the district court of jurisdiction to enter a ruling on the motion to reconsider. Therefore the court's ruling of October 23, 1998 has no legal effect. *See In re Estate of Herron*, 561 N.W.2d 30, 32 (Iowa 1997); *Wolf v. City of Ely*, 493 N.W.2d 846, 848 (Iowa 1992).

N.W.2d 873, 875 (Iowa 1997) (citations omitted). In determining whether the law has been correctly applied, we give weight to the commissioner's interpretation of the relevant statutory provisions, but are not bound by it. *Second Injury Fund v. Klebs*, 539 N.W.2d 178, 180 (Iowa 1995). We are bound by the commissioner's factual findings if they are supported by substantial evidence in the record. *Id.*

Industrial disability measures an injured worker's lost earning capacity. *See Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 157 (Iowa 1996) (citations omitted). Factors that should be considered include the employee's functional disability, age, education, qualifications, experience, and the ability of the employee to engage in employment for which the employee is fitted. *See Second Injury Fund of Iowa v. Shank*, 516 N.W.2d 808, 813 (Iowa 1994); *see also McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 192 (Iowa 1980). There are no guidelines establishing the weight to be given to each of the factors. *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 68 (Iowa App. 1991). Rather, it is necessary for the commissioner to draw upon prior experience and general and specialized knowledge to make a finding in regard to the degree of industrial disability. *Id.*

In her ruling, the industrial commissioner first outlined the evidence presented on the origins of Al-Gharib's depression and concluded that he had failed to carry his burden to show that it was casually connected to his work injury. The commissioner concluded that IBP should not be required to pay for any medical bills associated with Al-Gharib's treatment or diagnosis of his sinusitis, rhinitis, allergies, leg pain, face

pain, eye, eyebrow or eyelid trembling, or headaches. The industrial commissioner then determined that Al-Gharib's physical injury should be analyzed industrially. In her analysis, the commissioner stated:

> Defendant [IBP] points out that claimant's actual ratings of impairment for his arm are minimal, and there are few objective findings of impairment. Dr. Worrell has given claimant a permanent partial impairment rating of two percent of the body as a whole. He has rated claimant's right upper extremity at four percent. Dr. McMains has rated claimant's right upper extremity impairment at six percent.
>
> Some of claimant's pain, that he alleges led to his depression, stems from facial pain. Claimant also complained of right thigh pain, but no etiology for this was determined by Dr. Beattie. Claimant complained of headaches, "trembling eyes," blurred vision, and pain on the right side. Claimant also complained of trembling eyebrows. Claimant's headaches were attributed to histaminic headaches by Dr. Sue Barcellos. There is no medical opinion that any of this pain was caused by claimant's work injury to his arm.
>
> * * *
>
> Although an accommodation by an employer may not properly be utilized to lower an award of industrial disability from that which the injured worker has actually experienced [citations omitted], a failure to accommodate an employee's valid medical restrictions which results in increased disability, as here, is properly considered.
>
> * * *
>
> Claimant's motivation presents a mixed picture. Claimant expressed on many occasions to his physicians that he desired to work, and that he felt shame at not being able to work. However, claimant has not shown attempts to find substitute employment within his restrictions. Claimant's ratings of impairment are minimal, yet he has subjectively concluded he is unable to work.
>
> Claimant relies on the opinion of Dr. Harding that he is unable to work, and on the opinion of vocational rehabilitation counselor Russo, who also stated that claimant was presently unemployable. Dr.

> McMains on July 12, 1994 said that until claimant's arm "heals, or until he starts using it, he is virtually unemployable." On May 26, 1995 a Goodwill Industries Vocational Evaluation concluded that claimant was not employable at that time.
>
> Based on these and all other factors of industrial disability, it is found that claimant is presently permanently and totally disabled.

IBP claims the commissioner's ruling reveals that she improperly considered Al-Gharib's entire physical and mental condition in determining the extent of his disability. IBP argues that the commissioner could only consider the effect of Al-Gharib's work-related injuries in determining his disability.

We believe a cursory review of the commissioner's ruling would indicate that substantial evidence supports a finding of permanent and total disability, particularly given her reliance of the opinions of Dr. Harding, Dr. McMains, counselor Russo, and the Goodwill vocational evaluation. However, upon further examination, the record reveals that the evaluation and the witnesses each considered pain and injuries unrelated to Al-Gharib's work injury in coming to the conclusion that he was unemployable. Both Dr. Harding, a psychologist, and counselor Russo opined that Al-Gharib was unable to work not only because of his work injury, but also because of his psychological condition. The Goodwill evaluation cited Al-Gharib's headaches as a major factor affecting his work capability. Finally, Dr. McMains stated that Al-Gharib is virtually unemployable only *until he starts using his right arm again.* In her ruling, the commissioner acknowledged that Al-Gharib's "present disability appears to be more due to his right arm and shoulder pain, ***and his headaches***, than due to his

depression." (Emphasis added). After reviewing the agency decision, it is unclear whether the commissioner considered Al-Gharib's depression and headaches in determining the extent of his functional disability. Even if we were to assume the commissioner did not, we cannot find substantial evidence in the record to support a finding of total and permanent disability. Dr. Worrell rated Al-Gharib's right upper extremity at four percent, and offered a permanent partial impairment rating of two percent of the body as a whole. Dr. McMains rated Al-Gharib's right upper extremity impairment at six percent, and also opined that Al-Gharib's prognosis is excellent and his pain should subside over time. We acknowledge that there are no guidelines establishing the weight to be given to each of the factors in determining industrial disability. *See Lithcote*, 471 N.W.2d at 68. However, the commissioner's ruling in this case appears to have given significant weight to improper considerations unrelated to the work injury, namely Al-Gharib's depression and headaches. We therefore reverse and remand this matter to the industrial commissioner for clear application of the appropriate factors as outlined in *McSpadden*, et al., and more specific fact findings in determining the extent of Al-Gharib's industrial disability.

REVERSED AND REMANDED WITH DIRECTION ON APPEAL; CROSS-APPEAL DISMISSED.