FILED
AUG 3 0 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-327 / 89-1423

LARRY BEARCE,

Petitioner-Appellant/Cross-Appellee,

vs.

FMC CORPORATION,

Respondent-Appellee/Cross-Appellant.

29

Appeal from the Iowa District Court for Linn County County, Ansel J. Chapman, Judge.

Petitioner appeals the apportionment of his industrial disability between two separate injuries. The respondent cross-appeals, challenging the award of healing period benefits. **AFFIRMED IN PART, AND REVERSED IN PART.**

Thomas M. Wertz of Mollman & Wertz, Cedar Rapids, for appellant.

James E. Shipman and James M. Peters of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

30

Petitioner Larry Bearce appeals the apportionment of his industrial disability between two injuries, only one of which was compensable. Respondent FMC Corporation cross-appeals. It challenges the award of healing period benefits. We affirm in part and reverse in part.

Bearce was employed by FMC Corporation as a radial drill operator. In 1977 he injured his back in an automobile accident. The automobile accident was not related to his employment. He had surgery on his back in May 1980 because of this accident. Bearce returned to work on light duty until he received a full medical clearance in November 1983. In August 1984 he injured his back during the course of his employment. As a result of this accident, Bearce had surgery on his back in August 1985. Bearce did not return to his job at FMC, and he has not found other comparable employment.

Bearce filed a claim for workers' compensation. The Industrial Commissioner determined that after his second injury Bearce had an industrial disability of 35%. The commissioner concluded that 25% of that amount was attributable to the first accident, and 10% was attributable to the work-related accident. Bearce was also awarded healing period benefits for the period August 1984 until October 1986.

Bearce filed a petition for judicial review. The district court affirmed the commissioner. Bearce has appealed. He claims the commissioner should not have apportioned his industrial disability between the two accidents. Bearce states that his preexisting impairment did not reduce his earning capacity, but that the impairment acted with his later disability to produce a loss of earning capacity. He asserts that an impairment is not the same as a disability, and that he was not disabled by the first accident. Bearce believes there was no evidence in the record to support the commissioner's finding of apportionment.

Bearce also contends the district court erred by finding that he had received medical treatment for continued back pain from 1977 until he received a medical clearance in November 1983. Bearce states that he received no medical treatment relative to his first injury after February 1982. He feels that this is important because it shows he was not disabled at the time of the August 1984 work injury.

FMC filed a cross-appeal. It claims that there was not substantial evidence in the record to support the commissioner's award of two years of healing period benefits. According to FMC, Bearce's healing period ended in May 1985 when his treating physician released him from care. FMC believes that Bearce engaged in physical

exercise in the spring of 1985 which was inconsistent with his later back problems. FMC contends Bearce did not prove that his work injury was the cause of his later back condition which required surgery.

This appeal results from a contested case state agency proceeding. See Iowa Code § 17A.2(2) (1987). 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) (1987). 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) (1987). 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 at law. Roberts v. Iowa 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 if a reasonable person would find it adequate for reaching a decision. Peoples Memorial Hospital v. Iowa Civil Rights Comm'n, 322 N.W.2d 87, 91 (Iowa 1982).

The primary issue is whether the commissioner properly apportioned the disability rating between the two accidents. The first injury to the plaintiff's back was serious. It took the plaintiff several years to recover.

However, he did recover to the point where his doctor lifted his restrictions and where he could perform his job satisfactorily.

The Iowa Supreme Court in Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407, 408-09 (Iowa 1984), discussed when apportionment between two injuries is proper. The court relied on Larson for this portion of its opinion. Larson states:

> Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable . . . .
>
> The essential distinction at stake here is between a pre-existing disability that independently produces all or part of the final disability, and the pre-existing condition that in some way combines with or is acted upon by the industrial injury . . . .
>
> To be apportionable then, an impairment must have been independently producing some degree of disability before the accident . . . .

2 A. Larson, The Law of Workmen's Compensation § 59.22, at 10-365 (1981).

Larson speaks of the "essential distinction" between an apportionable disability and one that should not be apportioned. The court in Varied Enterprises, Inc., went on to discuss the distinction and stated:

> The principle which Larson describes limits apportionment to those situations where a prior injury or illness, unrelated to the employment, independently produces some ascertainable portion of the ultimate industrial disability which exists following the employment related aggravation.

Varied Enterprises, Inc., at 411.

In Bearce's case there is a prior injury that was unrelated to the employment. The question is whether it "independently produced some portion of the ultimate disability." Obviously the second injury would not have occurred with the same severity without the earlier injury. However, there is no evidence that plaintiff could not have continued working uninhibited, but for the second injury and the aggravation it caused.

Once again we turn to the court in Varied Enterprises, Inc., to help define the distinction. In that case the commissioner did not allow apportionment because medical opinion could not speculate on the apportionment of damage between the onset of an infarction and the aggravation caused by continued exertion. The court affirmed the commissioner. However, the court ruled that the employer could have had a claim for apportionment because; "the initial infarction produced by the diseased arteries, would have independently provided some portion of the employee's ultimate industrial disability even in the absence of the aggravating activities." Id. In other words, the evidence could show that the employee would have had the infarction regardless of the employment, and that the continued driving required by reason of his employment merely increased its severity. These facts would have allowed the apportionment, provided the doctors could find a reasonable apportionment between the two infirmities.

In the present case there is no evidence that plaintiff's prior back injury would have caused any disability without the occurrence of the second accident, and therefore it should not be an apportionable injury. This reading is in accordance with the following cases relied on by Professor Larson.

In Scherer v. Industrial Comm'n, 87 Ariz. 224, 349 P.2d 786 (1960), the claimant was injured during his employment, however the other physical disabilities which prompted termination of his employment showed no causal relation to the accident but were degenerative changes incident to age. (emphasis added). Compensation was denied. These degenerative changes are similar to the diseased arteries in Varied Enterprises, Inc.. They will create a disability in the future regardless of the nature of the industrial injury and should be apportioned.

In Arellano v. Industrial Comm'n, 25 Ariz. App. 598, 545 P.2d 446 (1976), the claimant injured his back at work. He had had a preexisting degenerative arthritis of the spine. The industrial injury aggravated the arthritis. Although the back injury subsided, the arthritic condition persisted, making him unable to work. Compensation was denied. In Cintas Corp. v. Price, 424 So.2d 900 (Fla. App. 1982), The claimant injured his back and neck in a noncompensable automobile accident. Subsequent to his "maximum medical improvement" he

reinjured his back in a compensable industrial accident. The court reversed an award of compensation because claimant's final permanent impairment never exceeded 5%, which was the extent of the damages following the first accident. The claimant's condition was not changed by the second accident and therefore he could not recover. The Arellano and Cintas Corp. cases provide situations where either the disability is likely to occur in the future or where the disability is in existence but the second injury does not increase its severity. See 2 A. Larson, The Law of Workmen's Compensation § 59.22 at 10-393-95 (1989), for further case law.

In Wilder v. Barbour Boat Works, 84 N.C. App. 188, 352 S.E.2d 690 (1987), an employee suffered compensable injuries to his knee, but medical testimony indicated that an earlier injury caused a 30% permanent impairment, and the second knee injury caused an additional 15% impairment. The court remanded for additional proceedings, but held:

> When a pre-existing, nondisabling condition is aggravated by a compensable injury, the employer must compensate the employee for the entire resulting disability. Disability is measured in terms of loss of earnings ability rather than physical infirmity.

Wilder, 84 N.C. App. at 196, 352 S.E.2d at 694.

Finally, a case involving a man whose disability after a fall consisted of:

> (1) limitation of spinal motion, (2) limitation of shoulder motion, (3) impaired eyesight, (4)

> impaired hearing, (5) arthritis in both hands, and (6) frequent urination at night, to mention a few. Only the first two were directly produced by the fall; the rest were due to "normal physiological degenerating processes not referable to the injury," although the degeneration might have been accelerated somewhat by the injury. The undisputed fact remains that claimant, up to the fall, had been working steadily and, for all that appears, would have continued to do so indefinitely but for the accident. In short, there was no apportionable "disability" prior to the accident.

2 A. Larson, The Law of Workman's Compensation, § 59.22 at 10-392 (1989); Furlong v. Northwestern Casket Co., 190 Minn. 552, 252 N.W. 656 (1934). The significance of Wilder and Furlong is that they show, as Larson points out, that apportionment does not apply in any case in which the prior condition was not a disability in the compensation sense. See 2 A. Larson, The Law of Workmen's Compensation, § 59.22 at 10-376 (1989). Bearce was not suffering from any disability in the compensation sense because there was no loss of earnings due to his first injury.

The majority of case law seems to allow apportionment in situations where either the disability is already in existence, or where the injury is such that disability is inevitable, i.e. was an independent cause of a continuing disability. Plaintiff's case does not satisfy either of these requirements. While the commissioner was not certain the plaintiff was completely healed prior to starting work after the first accident, he could not find any evidence that plaintiff had failed to perform his work or had even

complained of any pain during this period of employment. There is no question that plaintiff was not suffering from any loss of earning capacity, i.e. disability, from his first accident. He was earning approximately the same wage as he always had, and for his last 10 months was performing the same work, which required heavy lifting. There was no apportionable disability prior to his second accident.

We do not dispute the commissioner's findings of fact. However, as a matter of law their application is in error. There was no prior disability due to the first injury, nor was there any finding that the injury was an independent cause of any continuing disability. It was clearly "a" cause, but without the additional 10% of disability caused by the second injury there may have been no disability whatsoever. We reverse the finding requiring apportionment of the disability and hold that claimant is entitled to the entire 35% disability rating.

We affirm the healing period benefits awarded. There is substantial evidence to support the finding on this issue.

The costs of this appeal are to be assessed equally between the parties.

AFFIRMED IN PART, AND REVERSED IN PART.