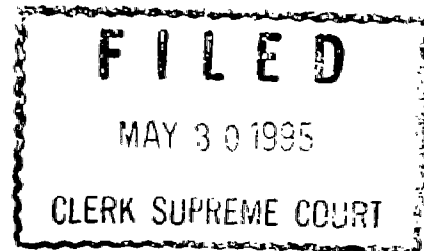


IN THE COURT OF APPEALS OF IOWA

No. 5-025 / 94-162



DONALD KUIKEN,

Petitioner-Appellant,

vs.

**DIELEMAN CONSTRUCTION COMPANY
and WEST BEND MUTUAL INSURANCE COMPANY,**

Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Linda R. Reade, Judge.

Claimant appeals the district court's affirmance of the amount the industrial commissioner determined he was entitled to receive in workers' compensation benefits.

AFFIRMED.

Steven C. Jayne, Des Moines, for appellant.

Vicki L. Seeck of Betty. Neuman & McMahon, Davenport, for appellees.

Considered by Habhab, P.J., and Cady, J., and Keefe, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

KEEFE, S.J.

On September 4, 1985, Donald Kuiken sustained injuries arising out of and in the course of his employment with Dieleman Construction. Kuiken was blading dirt on a road embankment when the tractor he was driving rolled on top of him. He suffered injuries to his pelvis and right humerus.

Kuiken has seen several doctors following his work-related accident. In July 1986 Kuiken saw a psychiatrist, Jerry Lewis, complaining of pain and consequent marital problems with his third wife. Kuiken believed his problems were a result of his 1985 injuries. Kuiken did not see Lewis again for several months, at which time Lewis denied his request for an open-ended prescription for antidepressant drugs. Beginning in January 1987 Kuiken periodically saw Lewis for purposes of antidepressant medication management. Lewis opined Kuiken had a personality disorder, which was not causally connected to the 1985 injuries, and a major depressive disorder, which was.

John Koch, an orthopedic surgeon, treated Kuiken in 1986 and 1987. Koch opined that Kuiken's depression was an outgrowth of his accident. Koch also opined, however, that Kuiken could control the depression with medication, had demonstrated some evidence of malingering and had physical capabilities beyond those claimed. Koch determined that Kuiken sustained a twenty-five percent industrial disability and released Kuiken to return to work in April 1987.

Following a three-day evaluation in August 1988, Gay Anderson, an orthopedic surgeon, psychiatrist, neurologist, and director of the Industrial Injury Clinic, found that Kuiken's physical injuries had healed in August 1988 and Kuiken needed no more orthopedic or chiropractic care. Anderson opined Kuiken had a ten percent permanent impairment. Anderson also concluded that Kuiken displayed elements of depression,

anger, passive, aggressive and optional behavior, and displayed a dependent histrionic and passive-aggressive personality structure, not caused by the accident.

Kuiken applied for workers' compensation benefits. Following a hearing, the deputy industrial commissioner proposed findings that Kuiken had not proved his emotional problems were causally related to the September 1985 injuries. The deputy found Kuiken had sustained a twenty-five percent industrial disability and proposed an award of benefits up to and not including April 1, 1987. Both Kuiken and Dieleman appealed. The industrial commissioner, *inter alia*, affirmed the above findings and conclusions.

Kuiken sought judicial review. The district court affirmed and Kuiken appeals. He contends the overwhelming weight of evidence establishes that he suffered substantial physical loss, which naturally resulted in emotional disorders. Because he continues to suffer from emotional problems, he contends the district court erred in affirming the industrial commissioner's findings related to industrial disability and the healing period.

I. Our review, like that of the district court, is for the correction of errors of law, not *de novo*. *Honeywell v. Allen Drilling Co.*, 506 N.W.2d 434, 435 (Iowa 1993). We may reverse the commissioner's findings of fact if they are unsupported by substantial evidence in the record made before the agency when the records are viewed as a whole. *Id.* Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. *Langley v. Employment Appeal Board*, 490 N.W.2d 300; 302 (Iowa App. 1992); *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa App. 1991). The question is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. *Neil v. John Deere Component Works*, 490 N.W.2d 80, 82

(Iowa App. 1992); *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230, 232 (Iowa App. 1990).

The court must consider all the evidence together, both in support and in opposition to the agency finding. *Burns v. Board of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993). However, because review is not de novo, the court must not reassess the weight accorded to various items of evidence. *Id.* That decision remains within the agency's exclusive domain. *Id.*

II. In this appeal, the claimant first raises an issue that the industrial commissioner erred in concluding that he (Kuiken) failed to prove his emotional problems are causally related to the injury of September 4, 1985. Kuiken admits that he has the burden of proving by a preponderance of the evidence that this claimed part of his injury arose out of his employment with Dieleman. *See McDowell v. Town of Clarksville*, 241 N.W.2d 904, 907 (1976). The burden requires a probability, a possibility is not sufficient. *Burt v. John Deere Waterloo Tractor Works*, 247 Iowa 691, 702, 73 N.W.2d 732, 737 (1955).

The Iowa supreme court has determined a psychological condition caused by or aggravated by a scheduled injury is compensable as an unscheduled injury. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993). This record reflect that Kuiken had a personality disorder before he reached adulthood. The depressive condition came to light after the date of injury. The causal connection between these disorders and the injury suffered was testified to by experts. They disagreed on the causal connection.

It is up to the commissioner to establish as a question of fact whether Kuiken's mental condition was aggravated or accelerated by the injury. *Iowa Beef Processors, Inc. v. Burmeister*, 301 N.W.2d 768, 770 (Iowa App. 1980). The commissioner found the testimony of Dr. Gay Anderson, an orthopaedist and psychiatrist to be more

credible. Dr. Anderson saw Kuiken during an intensive three-day evaluation at his Industrial Injury Clinic in October 1988. Dr. Lewis, a psychiatrist who saw Kuiken mainly to regulate medication, was found to be less credible. The commissioner set out his reasons for not accepting Dr. Lewis' conclusions, as required by Iowa Code section 17A.16.

A total review of all the evidence on this issue shows that the commissioner's decision is supported by substantial evidence, and it not unreasonable, arbitrary or capricious. It, therefore, follows that Dieleman is not liable for the medical bills arising from the treatment Kuiken's mental condition.

III. The next issue is Kuiken's claims that the commissioner erred in finding that his healing period ended March 31, 1987. Section 85.34(1) sets forth the standard for duration of a healing period. The evidence in this record shows that Kuiken was capable of returning to farming and road work as of April 1, 1987. That, in fact, he had returned to farming, his previous occupation, by that date.

IV. The next issue is Kuiken's allegation that he is totally and permanently disabled and the commissioner erred in giving him a 25% disability to the body as a whole. The amount of claimant's disability is a question of fact to be decided by the commissioner. *Cowell v. All-American, Inc.*, 308 N.W.2d 92, 95 (Iowa 1981). The commissioner's decision must be affirmed if it is supported by substantial evidence.

The commissioner did apply the proper standard as it relates to industrial disability. It is gauged by loss to the employee's earning capacity. *Simbro v. Delong's Sportswear*, 332 N.W.2d 886, 887 (Iowa 1983). The terms "disability" means "industrial disability", a loss of earning capacity, and not a mere "functional disability". Functional impairment is an element to be considered, but consideration must also be given to the injured employee's age, education, qualifications, experience, and inability to engage in employment for which he or she is fitted. *Olson v. Goodyear Service*

Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963); *Diederich v. Tri-City Railway Co.*, 219 Iowa 587, 593, 258 N.W. 899, 902 (1935).

At the time of his injury, Kuiken's occupation was farming. His work for Dieleman was temporary work. The record reflects that as of April 1, 1987, Kuiken was capable of doing either employment. In fact he had returned to farming by that time. By his own testimony, he was earning as much farming at the time of the hearing as he made before his injury.

As the trial court observed, "as for the severity of claimant's injury, there is substantial evidence in the record that Kuiken's complaints of chronic pain and physical incapability are greatly exaggerated by him." Viewing the total record the finding that Kuiken had a 25% disability to the body as a whole is supported by substantial evidence and is not unreasonable, arbitrary or capricious.

We affirm the decision of the district court and the industrial commissioner in every respect.

AFFIRMED.