

IN THE COURT OF APPEALS OF IOWA

No. 4-390 93-1955

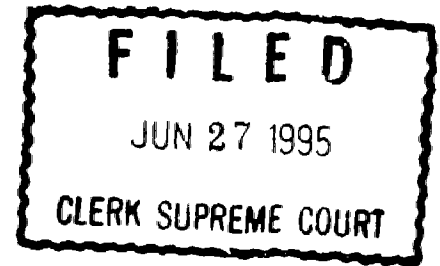
BETTY HAMMER,

Appellant.

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Page County, Glenn M. McGee,
Judge.

Betty Hammer appeals from a judgment of the district court affirming the
Industrial Commissioner's denial of the appellant's request for a review/reopening.

AFFIRMED.

Sheldon M. Gallner of Gallner & Gallner, P.C., Council Bluffs, for appellant.

Bonnie J. Campbell, Attorney General, and Joanne Moeller, Assistant Attorney
General, for appellee.

Considered by Donielson, C.J., Cady, J., and Peterson, S.J.*

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

PETERSON, S.J.

Betty Hammer (Hammer) appeals from a decision of the district court that affirmed the decision of the Industrial Commissioner that denied her petition for review/reopening. She contends that the Commissioner erred in failing to find she was entitled to a reevaluation of her previously-litigated industrial disability, and, the Commissioner erred as a matter of law in failing to find she was entitled to further compensation because she suffered a material and substantial change in her medical and economic condition. We affirm.

Decisions of the Industrial Commissioner are reviewed by the district court pursuant to Iowa Code chapter 17A. See Iowa Code § 86.26. The district court's scope of review under section 17A.19 and our review on appeal under section 17A.20 is at law and not de novo. In our review, we apply the standards of section 17A.19(a) to the agency's actions to determine whether our legal conclusions are the same as those reached by the district court. If our conclusions are the same, we affirm; otherwise, we reverse. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993).

Iowa Code section 17A.19(a) provides that:

The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant any other appropriate relief from the agency action, equitable or legal and including declaratory relief, if substantial rights of the petitioner have been prejudiced because the agency action is:

* * *

(e) affected by other error of law

(f) in a contested case, unsupported by substantial evidence in the record made before the agency when that record as viewed as a whole

Evidence is "substantial" if a reasonable person would find it adequate for reaching a decision. In making this determination, we are limited to the record made before the hearing officer, including any decision, opinion, or report by the hearing officer. *Peoples Memorial Hosp. v. Iowa Civ. Rts. Comm.*, 322 N.W.2d 87, 91 (Iowa 1982). The mere possibility that the record would support another conclusion does not permit the district court or this court to make a finding inconsistent with the agency findings so long as there is substantial evidence to support it. *Peoples*, 322 N.W.2d at 91. The fact that two inconsistent conclusions could be drawn from the same evidence does not necessarily mean that one of those conclusions is unsupported by substantial evidence. *Warrell v. Iowa Dep't of Job Serv.*, 356 N.W.2d 587, 589 (Iowa App. 1984). The findings of the Industrial Commissioner are to be applied broadly and liberally to uphold rather than defeat the Commissioner's decision; they are binding on appeal unless a contrary result is demanded as a matter of law. *Armstrong v. State of Iowa Buildings*, 382 N.W.2d 161, 165 (Iowa 1986). The question on judicial review is not whether the evidence might support a different finding, but whether the evidence supports findings the Commissioner actually made. *Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 237-38 (Iowa 1981). The question is not whether there is sufficient evidence to warrant a decision the agency did not

make, but whether there is substantial evidence to warrant the decision it did make. *Woods v. Iowa Dep't of Job Serv.*, 315 N.W.2d 838, 841 (Iowa App. 1981).

The record in this case will show that the claimant, Ms. Hammer, was fifty-one years old on March 26, 1990, and held a general education diploma with some college course work. She began work as a mental health worker/ resident treatment worker on September 6, 1976, at the Clarinda Treatment Complex. This work of generally giving care to residents was physically demanding. She was required to turn, feed, and bathe residents, frequently weighing over 150 pounds. Prior to this job, she had worked as a waitress and a bartender.

The work injury occurred on November 7, 1985. At that time, she was assisting another employee with a patient when his knees buckled while they were supporting him. As a result of this back injury at the L4-5 area, Ms. Hammer underwent surgery at that level on April 6, 1986. She returned to work on October 11, 1986, and was assigned to the substance abuse unit, which generally entailed lighter duty. However, this also involved the potential of physically-demanding situations such as altercations with patients. She continued working at this job until the pain became intolerable and she was unable to continue. She underwent a second surgical procedure at the same level, L4-5, on October 7, 1988.

Following this surgery, the claimant was notified that her position had been filled, although she had recall rights if she were to be released by her treating

physician. The arbitration decision filed on March 26, 1990, essentially found that the claimant willingly failed to return to work.

At the time of the arbitration hearing on January 17, 1990, Ms. Hammer had not sought employment because she believed herself an unreliable employee due to the residuals of the back injury. She also believed herself unable to engage in vocational rehabilitation or work in any capacity. She testified about her symptoms at this hearing in the following manner:

Q. Following the surgery that you had at the Omaha Methodist Hospital on October 7, 1988, did you feel significantly better? A. No.

Q. Or was there an improvement? A. The only improvement that I had since that surgery, that my leg doesn't hurt as bad as it did prior. My back still feels the same.

Q. And what are the symptoms that bother you, Ms. Hammer? A. Constantly back pain. Sometimes they are sharp, jabbing pains. Bending is difficult. If I walk a period of time, my leg gets numb. Sitting and standing over a period--I have to move a lot in order--seems like there is pressure. I have to move a lot.

Q. Are you able to sleep through the night? A. No.

Q. Are you able to ride long distances in the car? A. No.

Ms. Hammer's deposition was taken on March 19, 1991, as the result of the petition for review/reopening filed on June 7, 1990. At that time, she was asked to recite her **current** complaints. She responded as follows:

A. To make it very simple, it's just bothered me since I had surgery. I believe I can feel a ruptured disk. I don't know what the doctors can say. At times it's just--in laymen's terms, it feels like--the only way I can relate it is like a balloon is being blown up and it swells and a lot of pressure is being put on my back. And it hurts quite bad. I've never totally been without pain. The medication I am on will take the sharpness away. There is numbness in the left leg, the hips, and when I walk, there is numbness in the right leg also. And it's just quite

uncomfortable, and I don't like it. I wish something could be done, because I don't think it's a very good future for anybody.

Q. Okay. Any other symptoms, you described it felt like a balloon being blown up. A. There's--it feels like, sometimes, somebody is putting their hands on my shoulders and pushing me to--to where you can't go any further. There is a lot of pressure. There's pressure around the hips. It feels like I am being torn apart. Sometimes, it bothers--like it takes me a while to use anything with my arms, just kind of everything. And then the back of my neck, if you sit too long, ride in a car and all that stuff, it just feels like somebody is pushing my head down in. And there is a lot of pressure.

Q. Okay. And how are these complaints different than they were before the hearing we had in January? A. They aren't. Things just have not improved.

The arbitration decision set out the following restrictions that were suggested by Dr. Frank P. LaMarte:

1. No frequent or continuous bending, twisting, or stooping.
2. No lifting greater than fifteen pounds more than six times per hour.
3. Ability to alternate sitting and standing as needed.
4. Work four hours per day, five days per week, for the first month and advance one hour each day per month, as tolerated, until she has reached an eight-hour day.

The arbitration decision also set out some restrictions from Dr. Leslie C. Hellbusch.

I have recommended that she have a permanent twenty-pound lifting restriction and that she should have no repetitive bending of her lower back. It would be best for her to be allowed to move from a sitting to standing position and visa versa on the job as needed. She has some experience working on "substance abuse" and states that she can do this type of work and that it is within the restrictions placed on her. I have encouraged her to gradually increase her working activity and encouraged her to try to get back to work in April of 1989.

The arbitration decision also noted that Dr. John C. Goldner felt that the claimant was capable of functioning in a job consistent with her education, training, and experience, but that it should not involve lifting or bending.

The claimant has consulted Dr. Hellbusch, a neurosurgeon, since the arbitration hearing. In a letter to the claimant's attorney dated June 5, 1990, Dr. Hellbusch refused to alter his previous assessment of the claimant's physical impairment stating: "Since 25% permanent partial disability the body as a whole is near the top of the disability rating that I give people for back problems due to disk herniations, subsequent surgery, and continued significant discomfort." He also stated in another part of the letter "that is the amount of disability I give for someone who continues to have significant discomfort."

Beginning on February 13, 1990, the claimant began consulting with Dr. Eaves, who was board certified in family practice. He sees patients with lower back pain approximately three times a week. He initially treated Ms. Hammer with pain medication and referred her to the Clarinda Municipal Hospital for physical therapy. The claimant was complaining of increased pain in the lower back and numbness in the ball of the left foot. Dr. Eaves scheduled her for a Magnetic Resonance Imaging (MRI) examination.

The MRI was performed on May 22, 1990, by Dr. Kevin M. Cawley. He found a focal herniated disk present in the paracentral region of L3-4 extending to the left and encroaching on the nerve root sleeve. This was the level above the two

surgical procedures. He also found degenerative disk disease and previous surgery at the L4-5 with postoperative fibrosis present adjacent to the nerve root sleeve on the left and minimal loss of signal density consistent with degenerated disk disease at L5-S1, although no herniation was detected at L5-S1.

Dr. Eaves testified that based on Dr. Cawley's MRI report, a herniation at the L3-4 area on the left could account for some of the claimant's symptomology and, if it was not present previously, was indicative of a new finding which would aggravate her present condition. Dr. Eaves also noted that scar formation in the area of the previous surgical procedures was consistent with the claimant's subjective complaints of pain. He referred the claimant to Dr. Parsow.

Ms. Hammer saw Dr. Parsow, a specialist in physical medicine and rehabilitation. He diagnosed her as having a lumbar discectomy (failed back surgery), with persistent lumbar disc disease with radiculopathy and lumbar facet joint syndrome. Because of minimal improvement following her first two operations, he felt her prognosis was guarded. He declined to suggest physical restrictions as "highly arbitrary" and limited his opinion to an impairment rating of 23% of the body as a whole.

Dr. Eaves testified that based on his review of the MRI scan and Dr. Parsow's report, that the complaints of chronic or persistent pain were credible and that fibrotic tissue can create pain such as that which the claimant complains of. After seeing her again on January 16, 1991, and March 5, 1991, he testified he believed that she

showed some worsening symptoms and that she was not capable of engaging in a forty-hour week, fifty-week per year job. In his letter of March 11, 1991, Dr. Eaves stated that the claimant should not lift over ten pounds and could not stand in one spot for over ten to fifteen minutes and could not sit for any longer period of time and that stooping, climbing, kneeling, crawling, and anything over limited travel were "out."

The claimant saw Dr. Behrouz Rassekh, a neurologist, on June 7, 1990. Dr. Rassekh was furnished the MRI film and report of May 22, 1990. On June 15, he reported of her multiple complaints but made no objective finding except the absence of right ankle reflex and noted that the MRI indicated some bulging at L4-5 "which is a very common finding with some postoperative changes." Dr. Rassekh did not recommend further surgery or other therapy except continued exercise. He believed the claimant could do sedentary work which would not require repeated bending or lifting over fifty pounds.

The claimant consulted Dr. Hellbusch on June 12, 1990. He testified that the MRI of May 22, 1990, showed decreased signal insensitivity at L3-4, L4-5, and L5-S1, and that some epidural fibrosis was noted at L4-5 on the left and that there was a left disk bulge at L3-4. He believed that the claimant could return work with restrictions he had previously indicated, including a permanent twenty-pound lifting restriction, and no repetitive bending of the low back and no riding a motorcycle. The claimant had shortly following her second surgery asked whether she could ride a

motorcycle which Dr. Hellbusch interpreted as sending "mixed messages about the level of her discomfort."

Claimant returned to see Dr. Hellbusch on March 11, 1991. She complained of pain in the low back and midback and neck. The pain was described as about the same in terms of severity. She was walking three to four miles a day. Dr. Hellbusch found no neurologic deficit and a good range of motion in the neck and back and suggested that the claimant discontinue pain medication and visit the pain clinic at the University of Nebraska Medical Center. She was released by Dr. Hellbusch on an as-needed basis.

The claimant was seen at the University of Nebraska Medical Center Pain Program on May 24, 1991, for an evaluation. The initial impression by Dr. Nikola Boskovski on that date was of significant chronic lower back pain, with the claimant describing a change in the involvement of pain and numbness in the left leg during the past six to twelve months.

A repeat MRI was ordered and performed on June 1, 1991. This was read by Dr. Keith Kohatsu and Dr. Francis Hahn. They determined this showed postoperative changes of laminectomy at L4-5, but no evidence of recurrent disk disease or postoperative fibrosis to account for neurologic symptoms. Because of the discrepancy with the MRI of May 22, 1990, Dr. Boskovski suggested that it was unnecessary to have a third examination performed but that the claimant should take both MRIs to an independent radiologist for further interpretation. This was not done.

Dr. Boskovski told the claimant that "during your last visit we believe your pain is real and it is your right to search for the best answer from treatment."

The claimant was discharged before she completed the pain management program at the University. She was reluctant to participate in some of the sessions and refused to participate in others. She was especially reluctant to participate in the psychological aspects of the program, preferring physical therapy components. Dr. James Wilcoxson, Ph.D., a clinical psychologist, noted in the discharge summary that the claimant's prognosis for recovery, rehabilitation, and pain management was not good. He felt the claimant harbored a great deal of anger, resentment, and hostility concerning her injury and the litigation process and ineffectual medical treatment.

The claimant submitted copies of applications she made to various employers. She has registered with the Iowa Department of Job Service. She is also on the merit list for the State of Iowa for social worker, probation officer, income maintenance worker, activities aid, R.T.W., and pharmacy assistant. She has not had any job offers as a result of being on these lists.

One of the places she applied was the Bethesda Care Center. The assistant director of nursing, Ms. Deborah Kirchner, remembered the claimant applying for a nurse's aid position on May 25, 1990. At this time the care center had at least one opening in that position. Ms. Kirchner said that the claimant stated she had back surgery in the past but did not tell her that she would be unable to perform the functions of the nurse's aid. Her application indicated she had past experience in this

position. Ms. Kirchner offered her a job, which she contends the claimant accepted, and set an appointment for a physical. The claimant left, saying she had a doctor's appointment and approximately one hour later the claimant returned and told Ms. Kirchner she would be unable to accept the nurse's aid position because she had a slipped disk in her back. That was the last time Ms. Kirchner saw the claimant.

The claimant contends that she was not offered a job by the Bethesda Care Center but that she did receive a telephone call asking her to sign a release and was not advised of the necessity to take a physical examination.

The claimant has represented her back condition in different ways on some of the applications. On May 15, 1990, she made an application to the Clarinda Municipal Hospital. In that application, under the caption "physical disabilities or chronic illness," she noted back surgery 1988. In an application made to the Clarinda Company on June 19, 1990, the claimant checked the "yes" box when asked if she was physically or otherwise "unable to perform the duties of the job for which she made application" and added details concerning her restrictions. In a resume sent to the Second Judicial District Department of Correctional Services dated January 15, 1991, the claimant noted that she had "limited disabilities; excellent health" and said she enjoyed walking, bowling, reading, crafts, and debates.

Iowa Code section 86.14(2) provides that in a proceeding to reopen an award for payments, inquiry is to be made into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation previously awarded.

A change in the claimant's condition must be shown to justify changing the original award. *Henderson v. Iles*, 250 Iowa 787, 794, 96 N.W.2d 321, 324 (1959). Proceedings under Iowa Code section 86.14(2) are not to redetermine the condition of the employee as adjudicated by the first award. *Stice v. Consolidated Indiana Coal Co.*, 228 Iowa 1031, 1039, 291 N.W. 452, 456 (1940). A difference of opinion between experts or competent observers as to the degree of disability arising from the original injury is insufficient to justify a different determination on a petition for review/reopening. There must be substantial evidence of a worsening of the condition not contemplated at the time of the first award. *Bousfield v. Sisters of Mercy*, 249 Iowa 64, 69, 86 N.W.2d 109, 113 (1957). A basis for allowance of additional compensation will exist on a proper showing that facts relative to an employment-connected injury existed but were initially unknown and could not have been discovered by the exercise of reasonable diligence. This has been referred to as a substantive omission due to mistake at the time of any prior settlement or award. See *Gosek v. Garmer & Stiles Co.*, 158 N.W.2d 731, 735 (Iowa 1968). If the subsequent evaluation results from an unexpected deterioration of the claimant's physical condition, the proceedings under this chapter will also lie. *Bousfield*, 249 Iowa at 69, 86 N.W.2d at 113. It must be shown that the physical condition resulting from the injury progressively worsened beyond what was anticipated or failed to improve to the extent anticipated. *Meyers v. Holiday Inn of Cedar Falls*, 272 N.W.2d 24 (Iowa App. 1978). The purpose of this section is to allow the Industrial Commissioner to

be able to fairly evaluate the claimant's condition because of the lack of information of the nature referred to herein at the time of the original hearing. *Id.*

The claimant initially contends that the Industrial Commissioner erred in failing to find that the claimant was entitled to a reevaluation of her previously-litigated industrial disability. We believe that the Industrial Commissioner's decision was supported by substantial evidence in the record.

Hammer contends that a changing condition should be found because her condition failed to improve to the extent originally anticipated. There is no medical evidence in the record to indicate that an anticipated improvement as a result of the surgeries. There also is no medical evidence to indicate that any of the doctors who examined Ms. Hammer were mistaken in their opinions. There is medical evidence in the record that could indicate that Ms. Hammer's condition at the time of the review/reopening hearing was the same as it was at the time of the arbitration hearing.

The claimant also argues that her condition has changed in that her pain is worse now than it was at the time of the arbitration hearing. There is evidence in the record which could also indicate that her pain is approximately the same as it was at the time of the arbitration hearing. She also argues that the restrictions placed upon her by the various doctors before the arbitration hearing as opposed to after the arbitration hearing indicate the restrictions are more severe and consequently her condition has deteriorated. However, the restrictions can also viewed from a

standpoint that the change in the restrictions is not significant enough to indicate a deterioration.

The claimant also argues that the MRI performed on May 22, 1990, will support a determination that her condition has changed since the first hearing. However, the results of that MRI are contrary to an MRI performed on June 1, 1991. We note that it is truly unfortunate that the recommendations of Dr. Boskovski to have both of the MRIs reviewed by a third source was not followed.

The claimant next contends that the Industrial Commissioner erred as a matter of law in failing to find that she was entitled to further compensation because she suffered a material and substantial change in her medical and economic conditions. Matters are established as a "matter of law" when the evidence is undisputed and not subject to different inferences or no other factual finding could reasonably be drawn from the evidentiary facts. *Johnson v. Bd. of Adj.*, 239 N.W.2d 873, 888 (Iowa 1976); *Robinson v. Dep't of Transp.*, 296 N.W.2d 809, 812 (Iowa 1980). A workmen's compensation award may be reopened upon proof of a change in physical and economic conditions. *Gallardo v. Firestone Tire & Rubber Co.*, 482 N.W.2d 393, 395 (Iowa 1992).

Ms. Hammer contends that her physical condition has substantially changed because she has failed to improve and her economic condition has also changed because she has been unable to secure employment. There is evidence in the record which could indicate that her physical condition is substantially the same as it was at

the time of the arbitration hearing, and there is evidence in the record which would indicate that she has been offered at least one job which she failed to pursue. There is also evidence in the record which could indicate that she has applied for positions where no positions were available. The applications that were submitted contained different descriptions of her physical disability and on one she indicated she had some disabilities but was in excellent health. She was unemployed at the time of the original decision and was unemployed at the time of the review-reopening hearing.

We cannot say that based on this record the claimant has established as a matter of law that her physical and economic conditions have changed to the extent that it would support a review/reopening proceeding.

To summarize, we find that the Industrial Commissioner did not err in finding that the claimant was not entitled to a reevaluation of her previously-litigated industrial disability and that he did not err as a matter of law in failing to find that the claimant was entitled to further benefits because she had suffered a material and substantial change in her medical and economic conditions.

Costs are taxed to the claimant.

AFFIRMED.