

IN THE COURT OF APPEALS OF IOWA

No. 2-039 / 91-795

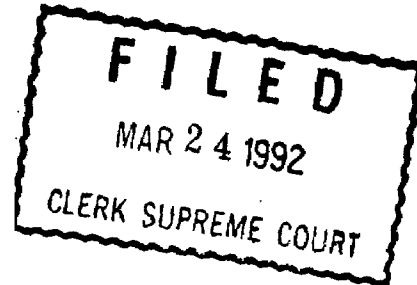
KEVIN SPENCE,

Appellant,

vs.

GRIFFIN WHEEL COMPANY,

Appellee.



Appeal from the Iowa District Court for Polk County,
Robert A. Hutchison, Judge.

Spence appeals from a district court ruling affirming
the industrial commissioner's decision. **AFFIRMED.**

Joseph M. Bauer of Reavely, Shinkle, Bauer & Lawyer,
Des Moines, for appellant.

John E. Kultala of Dickey, Smith, Kultala & McDonald,
Keokuk, for appellee.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

OXBERGER, C.J.

Kevin Spence was employed by Griffin Wheel when, on April 10, 1981, he sustained an injury to his left foot. Spence underwent a series of treatments which resulted in amputation of all of his toes on his left foot. In October 1982, Spence filed an action before the Iowa Industrial Commissioner seeking workers' compensation benefits.

In 1983 Spence returned to work as a security guard instead of his former position as a utility man in the foundry. The parties settled the workers' compensation case pursuant to an agreement in March 1984. The agreement provided Spence would receive a lump sum settlement in return for discharging Griffin from liability for his present condition. The agreement noted assessments by doctors on the functional impairment to Spence's foot. It was also noted the agreement was subject to a review-reopening proceeding under section 85.26. On April 4, 1984, the industrial commissioner approved the settlement.

In March 1985 Spence filed a review-reopening petition with the industrial commissioner. A review-reopening hearing was held before a deputy commissioner in March 1988. Spence alleged he suffered a change in his mental condition and his back since the accident justifying a further award. The deputy filed a decision in May 1988 awarding increased disability compensation. Griffin Wheel

appealed. The industrial commissioner determined Spence failed to carry his burden to establish a change in his mental and back conditions since the 1984 settlement and denied his claim. He filed a petition for judicial review in district court. Spence claimed the agency action was not supported by the record and its action violated constitutional and statutory provisions. The district court found Spence failed to raise the constitutional issue before, but that, in any case, the commissioner did not unconstitutionally apply section 86.14 to the facts in this case. The court then affirmed the agency and Spence appeals.

I. Constitutional Challenge: Spence asserts the district court erred in determining he was barred from presenting a constitutional challenge to the commissioner's ruling. Spence admits his challenge of section 86.14 is as applied to the facts of this case rather than the constitutionality on its face. Where the constitutional issue sought to be raised directly affects a matter pending before an agency, administrative exhaustion should ordinarily precede a judicial inquiry into the statute's validity. Shell Oil Co. v. Bair, 417 N.W.2d 425, 429 (Iowa 1987).

The trial court found Spence's constitutional challenge to the commissioner's construction of section 86.14, as applied to his case, could not be raised for the first time

on judicial review. We agree. We find no merit to Spence's argument that the issue could not have been raised until after the final agency decision. We affirm the district court on this issue.

II. The Commissioner's Decision: We consider whether the district court erred in affirming the decision of the Iowa Industrial Commissioner. Spence asserts the industrial commissioner and district court erred in not allowing a review-reopening proceeding. He argues it was the apparent intent of the parties for the 1984 settlement to be limited to the loss of the leg. Griffin argues the commissioner was correct in finding the record established both the back and mental complaints were in existence at the time of the settlement and were, therefore, within the contemplation of the parties at that time. We agree with Griffin.

Attached to the settlement itself were statements by Dr. Eddingfield and Dr. Bruce Sprague indicating Spence had a permanent impairment of 50-75 percent concerning the left foot, 15 percent loss of function of the right lower leg, and 10 percent loss of function of total body. In addition, the statements noted Spence was having lower back pain and would never walk with a normal gait. Spence admitted he had back pains at that time. If a claimant sustained injuries at the time of the original action which were known at the time of his claim but were not included

in that claim, he cannot for the first time assert disability from those injuries in a petition based on "change of condition." 2 Larson, Workers' Compensation (Desk Ed.) §81.20 and §81.40. There must be a worsening or deterioration of claimant's condition not contemplated at the time of the first award. Id. If claimant does not know of the other injuries at the time of the original claim, he is not barred from asserting them in his reopening petition, provided those injuries could not have been discovered by the exercise of reasonable diligence. Id.

The commissioner found Spence knew of his back condition at the time of the settlement. We concur. The commissioner correctly held Spence had the burden to show a change of his condition since the settlement. See Gosek v. Garmer and Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968). The commissioner found claimant's testimony was not credible. We defer to the commissioner's judgment on the issue of credibility. We affirm.

AFFIRMED.