FILED
DEC 31 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-467 / 91-470

655

SANDRA K. VAUGHAN,

Petitioner-Appellee,

vs.

OSCAR MAYER FOODS CORPORATION,

Respondent-Appellant.

Appeal from the Iowa District Court for Audubon County, Keith E. Burgett, Judge.

Employer appeals the district court's reversal of the Industrial Commissioner. **DISTRICT COURT REVERSED; INDUSTRIAL COMMISSIONER AFFIRMED.**

Pam G. Dahl, Des Moines, for appellant.

Russell S. Wunschel of Wunschel Law Firm, P.C., Carroll, and E. W. Wilcke, Spirit Lake, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ. but decided en banc.

SACKETT, J.

The question in the appeal of this worker's compensation case is whether the trial court correctly held as a matter of law the death of Richard Vaughan was related to his employment with Oscar Mayer Foods Corporation. The trial court reversed the decisions of a deputy Iowa Industrial Commissioner and the Iowa Industrial Commissioner that the claimant did not prove the death was work related. We reverse the district court and affirm the Industrial Commissioner.

Claimant Sandra K. Vaughan was married to Richard Vaughan when he died on July 23, 1983. Richard was forty years old at the time of his death. He was overweight and a heavy smoker. He started working for Oscar Mayer in the mid-1960s. He performed a series of jobs, including boning loins, butts, and hams. Richard left his employment with Oscar Mayer in May 1983. His retirement went into effect on May 20, 1983.

Richard and a friend were visiting in Kansas on July 22, 1983. The weather was hot. Richard was not feeling well. That evening he attended a barbecue and drank six beers. His friend went with him to a camper where they were to spend the night. He was restless, was rocking his left arm, and complained of shoulder pain. He went to bed and woke up at 4 a.m. holding his left arm. He asked for Rolaids for an upset stomach. He vomited, carried on a

short conversation, and fell forward. An ambulance came within thirty minutes. He was dead. An autopsy was performed, and the cause of death was determined to be acute cardiac decompensation with severe coronary atherosclerosis.

Claimant filed a petition for arbitration claiming decedent's death was work related. The matter was submitted to a deputy industrial commissioner who did not find the death to be work related. The matter was appealed to the industrial commissioner who found decedent's death occurred as the result of the normal progressive nature of coronary atherosclerosis. Appeal was taken to the district court. The district court found the claimant met the requirements by a preponderance of the evidence based on the record and the commissioner was obligated as a matter of law to find the claimant had sustained her burden of proof.

The employer has appealed contending the trial court erred, there was substantial evidence to support the commissioner's findings, and the commissioner's decision should have been affirmed.

We review the decision of the Iowa Industrial Commissioner, not that of the deputy. See Giere v. Aase Haugen Homes, Inc., 146 N.W.2d 911, 915 (Iowa 1966). We correct errors of law made by the industrial commissioner or the trial court. See Briar Cliff College v. Campolo,

360 N.W.2d 91, 93 (Iowa 1984); Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 63 (Iowa App. 1981).

The claimant has the burden of proving by a preponderance of the evidence the death of the decedent was caused by an incident or activity that arose out of and in the course of his employment. See McDowell v. Town of Clarksville, 241 N.W.2d 904, 907 (Iowa 1976); Musselman v. Central Tel. Co., 261 Iowa 352, 356, 154 N.W.2d 128, 130 (1967). A possibility is not sufficient, a probability is necessary. See Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 701, 73 N.W.2d 732, 738 (1956). For an injury to arise out of the employment means the employment must have produced or proximately caused the injury. See Briar Cliff, 360 N.W.2d at 94. The question of direct causal connection is essentially within the domain of expert testimony. See Bradshaw v. Iowa Methodist Hosp., 251 Iowa 375, 383, 101 N.W.2d 167, 171 (1960). Expert testimony is considered in light of all other circumstances presented in the record. See Burt, 247 Iowa at 703, 73 N.W.2d at 738. The trier of fact may reject in whole or in part the opinion of the expert. See Sondag v. Ferris Hardware, 220 N.W.2d 903, 907 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 519, 133 N.W.2d 867, (1965).

It is claimant's position that the decedent's work aggravated or altered the course of his preexisting heart condition and hastened his death. The person with a heart condition has a compensable injury if the medical evidence proves his or her work ordinarily requires heavy exertions which superimpose on the defective heart and aggravates or accelerates the condition. See Sondag, 220 N.W.2d at 905; Littell v. Lagomarcino Grupe Co., 235 Iowa 523, 529, 17 N.W.2d 120, 123-24 (1945).

In reviewing the evidence we defer to the agency's expertise. See Cerro Gordo County Care Facility v. Iowa Civil Rights Comm'n, 401 N.W.2d 192, 195-96 (Iowa 1987). The commissioner's findings of fact are binding on us if supported by substantial evidence in the agency record and a contrary result is not demanded as a matter of law. See Higgins v. Iowa Dep't of Job Serv., 350 N.W.2d 187, 191 (Iowa 1984). When facts are in dispute, or when reasonable minds might differ on the inferences to be drawn from the evidence, the agency's findings are conclusive. Harland v. Iowa Dep't of Job Serv., 350 N.W.2d 192, 193 (Iowa App. 1984).

We review the evidence in the light most favorable to the commissioner's decision. Decedent was right-handed. Besides working for Oscar Mayer, he also farmed, hunted, repaired automobiles and his own farm machinery. He was six feet tall, weighed 210 pounds, and smoked two packages

of cigarettes a day. Decedent began to complain of left shoulder pain on July 12, 1982. At the time he was working as a rough butt boner, and he indicated to the plant nurse the lifting and twisting motion involved in boning the rough butts bothered his left shoulder and arm. He was examined by Dr. Robert Deranleau, who diagnosed his problem as muscle strain and placed him on light duty for one week. Decedent's condition improved and he returned to regular duty on July 9, 1982. Three days later he complained of soreness in his left shoulder, and Dr. Deranleau extended his light duty one additional week. On July 23, 1982, decedent reported to the plant nurse he had a bump on his left shoulder blade. On July 27, 1982, decedent reported his shoulder was still sore and swollen near the shoulder blade. He saw Dr. Deranleau on July 28, 1982. Deranleau referred him to a neurosurgeon, Dr. Robert Hayne. Hayne examined him on September 13, 1982. Decedent told Hayne he would only experience pain when he did something with his arm, and the strength of his arm was below par. He said his shoulder would hurt if Hayne even lifted his left arm. Hayne took cervical spine X-rays. They were negative. A myelogram was done on September 29, 1982, and revealed no definite abnormalities. Both an EKG and an SMA6 were performed with normal results. Hayne diagnosed cervical myofascial strain of the upper cervical area. Hayne recommended decedent rest his shoulder

conservatively, and continue light duty for another six weeks. Decedent missed four weeks of work after experiencing problems from the myelogram. He received disability benefits. Hayne released decedent for light duty work on October 18, 1982. He examined decedent again on November 3, 1982, and reported he was complaining of pain in the left scapula and shoulder region. The neurological examination was essentially within normal limits but the left subdeltoid test was positive. Hayne felt decedent had developed subdeltoid bursitis, and referred him to Dr. Stephen Taylor, an orthopedic surgeon, for further evaluation.

Taylor examined decedent on November 11, 1982, and initially felt decedent had a possible rotator cuff tear of the left shoulder. Taylor performed a shoulder arthrogram. It was normal. Taylor reported there were no neurologic deficits in the upper extremity, and both Phalen's and Tinel's tests were negative. The Allen's test for thoracic outlet syndrome was also negative. Taylor suggested a subacromial injection to relieve discomfort, but decedent did not want the injection.

Decedent continued light duty work. On February 9, 1983, he was examined by Dr. Peter D. Wirtz, an orthopedic surgeon. Wirtz reported decedent continued to complain of pain in his left shoulder and arm and recent numbness in his long and index fingers. Wirtz reported decedent had

full range of motion in both his left shoulder and elbow. He indicated decedent had a positive Tinel's sign and decreased feeling over the left thumb, index and long fingers. Wirtz diagnosed decedent's shoulder condition as tendinitis.

On November 23, 1982, decedent was treated by a chiropractor and underwent a series of chiropractic adjustments or treatments through February 25, 1983. Decedent said he felt better after the treatments but still had pain in his left shoulder.

On March 24, 1983, decedent was examined by Dr. John A. Grant, an orthopedic surgeon. Grant reviewed Deranleau's, Hayne's, Taylor's and Wirtz's records and diagnosed decedent's condition as synovitis and rotator cuff syndrome.

Decedent returned to his regular job as a rough butt boner in mid-March of 1983.

In April and May of 1983 a new labor agreement was negotiated at Oscar Mayer's. One of the provisions of the new contract was that employees could leave and receive a lump sum payment as a buyout of the old contract. Decedent decided to retire. He said he wanted a new career.

The autopsy showed decedent died from acute cardiac decompensation due to severe coronary atherosclerosis. The district court's decision concludes the shoulder pains the decedent experienced at work were repeated incidents of

angina. The evidence is inconclusive as to whether the decedent had angina in connection with his work. The deputy concluded he may have had aggravations at work but, if he did, the aggravations were temporary and did not substantially alter the course of his heart disease. These findings were supported by the testimony of Dr. From that each episode of angina is completely reversible and was reversed and theoretically not associated with damage.

No physician who examined or treated decedent during his life found he had heart disease. Decedent was seeing physicians prior to, during, and after seeing physicians retained by Oscar Mayer, none of whom diagnosed a heart condition. It is not conclusive the symptoms decedent exhibited were angina or that shoulder pain was masking angina. We affirm.

DISTRICT COURT REVERSED; INDUSTRIAL COMMISSIONER AFFIRMED.

All judges concur except Habhab, J., who dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the trial court.