IN THE COURT OF APPEALS OF IOWA

No. 1999-371 (9-624) / 98-1998
Filed December 13, 1999

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DEC
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PHILIP H. SWARTZENDRUBER,
Petitioner-Appellant,

vs.

MEL SCHIMMEL and HOLIDAY FOODS, Employer, and STATE FARM INSURANCE, Insurance Carrier,
Respondents-Appellees.

Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge.

The petitioner appeals from the district court's ruling on judicial review upholding the Industrial Commissioner's summary judgment in favor of the employer and workers' compensation insurance carrier. **REVERSED AND REMANDED.**

Mary K. Hoefer of Mears Law Office, Iowa City, for appellant.

James M. Peters and Allison M. Heffern of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids for appellees.

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

HECHT, J.

I. Background Facts and Proceedings.

Plaintiff Philip Swartzendruber ("Swartzendruber") underwent hip prosthesis surgery in 1985. Thereafter he experienced periodic hip and back pain which caused him to limp and use a cane intermittently. Swartzendruber's medical records evidence the prosthesis was found to be "loose" in February of 1992. Notwithstanding this physical impairment, he was able to continue to work.

On Friday, January 7, 1994, Swartzendruber "faced" shelves for his employer for several hours. The work required him to get down on his knees approximately fifteen to twenty times. By the time his shift ended, he was experiencing pain in the back and hip. Swartzendruber described the pain as "basically the same kind of pain . . . just more intense" than the pain he'd had intermittently since the 1985 hip replacement surgery. Early the next morning, he was examined at a hospital emergency room. X-rays were taken, and Swartzendruber was informed his artificial hip "was loose." He testified he attributed the problem to the work he had done for the employer the night before. Swartzendruber called the employer and informed him he might not be able to be at work on the following Monday, January 10, 1994. Emergency room personnel instructed Swartzendruber to schedule an appointment with an orthopedic surgeon, and he did. The orthopedic specialist who examined Swartzendruber on January 13, 1994, advised hip surgery.

Swartzendruber filed his original notice and petition with the Iowa Industrial Commissioner[1] on January 12, 1996. Defendant employer and workers' compensation insurance carrier filed a motion for summary judgment contending Swartzendruber's claim had expired pursuant to the applicable statute of limitation. *See* Iowa Code § 85.26(1) (1999). Swartzendruber resisted the motion, claiming he knew he had sustained an injury on January 7, 1994, but he did not know the seriousness of the injury until the orthopedic specialist advised surgery on January 13, 1994.

The industrial commissioner granted summary judgment. Swartzendruber sought judicial review. The district court affirmed the decision of the agency. Swartzendruber appeals.

II. Standard of Review.

Our review of a summary judgment granted in an administrative agency is for errors of law. *John Deere Dubuque Works v. Meyers*, 410 N.W.2d 255, 256 (Iowa 1987); Iowa Code § 17A.19(8)(3) (1999).

III. Discovery Rule.

The "discovery rule" applies to the two-year period of limitations for original workers' compensation actions under Iowa Code section 85.26 (1999). *Orr v. Lewis Cent. Sch. Dist.*, 298 N.W.2d 256, 261 (1980). Under the rule, the period of limitations does not begin to run until the claimant knows of his injury and its

[1] The commissioner is now known as the Iowa Workers' Compensation Commissioner.

probable compensable nature. *Id.* The "date of injury" is not necessarily the same as the date when the claimant knows of the "probable compensability" of the injury. In *Dillinger v. City of Sioux City,* 368 N.W.2d 176 (Iowa 1985), the claimant injured his back while lifting in the course of his employment as a meter man for the city's water department. He was diagnosed with degenerative intervertebral disc disease which did not prevent him from continuing to work for the city. Approximately two years later, Dillinger fell from a ladder into a pit and reported a resulting low back injury to the employer on October 8, 1975. Though he experienced back pain for two or three days after the 1975 fall, Dillinger continued to work until pain forced him to terminate his employment in April of 1977. He underwent lower back surgery in December of 1977, and commenced a worker's compensation contested case proceeding in April of 1978. The industrial commissioner dismissed Dillinger's claim on the ground it was not filed within the applicable limitations period. In a per curiam opinion, the Iowa Supreme Court reversed in light of its ruling in *Orr.* On remand, the industrial commissioner again dismissed Dillinger's claim, this time on the ground he had failed to comply with the notice provisions of Iowa Code section 85.23 by giving a second notice to the employer within ninety days after he knew of the probable compensability of the October 8, 1975 injury. *Id.* at 179. On judicial review, the district court reversed the agency and held a second notice to the employer was not required. The supreme court affirmed the district court and observed:

> Claimant had a back injury in 1973 which hurt from time to time until he fell into the pit. He recalled that his back hurt for two or three

> days. The pain subsided, and he continued to work. The finder of fact could determine that the employee, as a reasonable person, did not recognize the nature, seriousness and probable compensable characteristics of his injury or disease until within two years of the commencement of his proceedings. Whether the employee possessed such knowledge the day he reported the accident is an issue of fact.

Id. at 182.

Summary judgment is appropriate only if there exists no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 237(c); *see Farm Bureau Mut. Ins. Co. v. Milne,* 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. *Milne,* 424 N.W.2d at 423. The evidence must be viewed in the light most favorable to the resisting party. *Thorp Credit, Inc. v. Gott,* 387 N.W.2d 342, 343 (Iowa 1986). The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. *Id.*; *Sherwood v. Nissen,* 179 N.W.2d 336, 339 (Iowa 1970).

The record in this case does contain a genuine issue of material fact as to the date when Swartzendruber knew of the probable compensability of his injury. Like the claimant in *Dillinger,* Swartzendruber had a pre-existing physical infirmity which intermittently caused pain. In an affidavit in support of his resistance to the motion for summary judgment, Swartzendruber specifically stated he did not understand the seriousness of the injury until January 13, 1994, when the orthopedic surgeon told him he needed hip surgery. When this and other evidence in the record is viewed in the

light most favorable to Swartzendruber, a reasonable fact finder could find that, until January 13, 1994, the claimant - a lay person without medical training - believed the pain in his hip and back amounted to a mere exacerbation of his pre-existing chronic hip pain condition; and the exacerbation would promptly subside without significant loss of work time or earning capacity as it had on other occasions since the 1973 injury. Where the evidence in the record before the agency and the district court would support a fact finding Swartzendruber didn't know the seriousness of the injury until January 13, 1994, a date within two years of the filing of the original notice and petition with the agency, it was error to grant summary judgment in favor of the employer and insurance carrier. We remand this action to the Iowa Workers' Compensation Commissioner for further proceedings consistent with this decision.

REVERSED AND REMANDED.