IN THE COURT OF APPEALS OF IOWA

No. 5-973 / 05-1214
Filed June 28, 2006

SKW BIOSYSTEMS/DEGUSSA HEALTH AND NUTRITION, and FIREMAN'S FUND INSURANCE CO.,
Petitioners-Appellants,

vs.

KEITH WOLF,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

An employer appeals the district court's affirmance of an award of workers' compensation benefits to an employee. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Nathan R. McConkey of Huber, Book, Cortese, Happe & Lanz, P.L.C., Des Moines, for appellants.

Edward J. Cervantes of Cervantes & Gordon, P.L.C., Davenport, for appellee.

Considered by Miller, P.J., and Vaitheswaran, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

NELSON, S.J.

I. Background Facts & Proceedings

Keith Wolf was employed by SKW Biosystems, now known as Degussa Health and Nutrition. SKW engaged in the processing of animal parts, especially pig skins. Wolf has a high school degree, and his employment history is limited to jobs involving physical labor. Wolf's job at SKW involved a great deal of lifting.

Wolf had several back injuries while working at SKW, but he did not receive any medical restrictions or require routine medication for these injuries. In April 1999, Wolf had a laminectomy at L4-5.[1] He was released to work on August 16, 1999, with a fifty-pound lifting restriction.

Wolf returned to his job, which required him to routinely lift fifty-pound bags of pork cracklings. In about January 2000, Wolf began to develop progressively worse back pain. Wolf had a new MRI in April 2001, which showed severe and accelerated disc degeneration at L4-5. Dr. David Field took Wolf off work. Dr. Timothy Millea performed an anterior L4-5 discectomy and interbody fusion in January 2002.

Dr. Millea rated Wolf's impairment at twenty percent of the whole person. He limited Wolf to working only six hours per day, no lifting over twenty pounds, and no climbing or crawling. Dr. Millea gave the opinion that Wolf's "return to work after his surgery in Dubuque was a substantial and material aggravation of his lumbar spine problems." Wolf had an independent medical evaluation by Dr.

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[1] Wolf has a separate workers' compensation claim regarding an alleged injury on December 14, 1998, which resulted in the surgery in April 1999. That claim was decided in a separate appeal, *SKW Biosystems v. Wolf*, No. 05-1373 (Iowa Ct. App. May 10, 2006).

R.F. Neiman, which found "he has increased level of impairment related to his injury that occurred at work related to repetitive trauma." Dr. Neiman rated Wolf's impairment at twenty-three percent of the whole person.

Due to his medical restrictions, Wolf could not return to his previous job. He has asked SKW for employment, but did not receive a response. Wolf is currently taking community college classes in the field of business.

Wolf filed a claim for workers' compensation benefits. After an administrative hearing, the deputy workers' compensation commissioner determined "Wolf's continued work for SKW following his first surgery aggravated his preexisting degenerative condition and is a substantial causative factor." The deputy found Wolf had an industrial disability of sixty percent. The deputy noted "Given his current work restrictions, he is now limited essentially to sedentary work for which he has little education and no vocational background." The deputy determined apportionment did not apply here because the prior injury did not independently produce some ascertainable portion of the present disability. The deputy determined Wolf did not properly raise an argument relating to a credit for disability payments.

The workers' compensation commissioner determined the full responsibility rule applied, and there was no basis for apportionment under Iowa Code section 85.36(9)(c) (2001). The commissioner affirmed the deputy on all other issues. Both parties filed applications for a rehearing. The commissioner denied the applications.

SKW filed a petition for judicial review. The district court found there was substantial evidence in the record to support a finding that Wolf sustained a compensable cumulative injury. The court also found there was substantial evidence to support the award of sixty percent industrial disability. The court agreed that apportionment should not apply under the facts of this case. Finally, the court determined the commissioner erred in finding that SKW was entitled to a credit under section 85.38(2) for past disability payments. The court concluded the parties had not stipulated to the credit. SKW now appeals the decision of the district court.

II. Standard of Review

Our review is governed by the Iowa Administrative Procedure Act. Iowa Code § 17A.20 (2003); *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 216 (Iowa 2004). We review the district court's decision by applying the standards of chapter 17A to the agency action to determine if our conclusions are the same as those reached by the district court. *University of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

III. Compensable Injury

SKW contends there is not substantial evidence in the record to support a finding that Wolf suffered a cumulative work-related injury. It asserts that Wolf was not credible. SKW argues that Wolf never actually recovered after his April 1999 surgery, and so he suffered no new injury. SKW also argues that Wolf's back condition is actually the result of a lifetime of hard work.

We may reverse, modify, or grant other relief if a party shows the agency's action is "[b]ased upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f). "Substantial evidence" is defined as:

> [T]he quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Iowa Code § 17A.19(10)(f)(1); *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603 (Iowa 2005).

We conclude there is substantial evidence in the record to support the commissioner's determination that Wolf suffered a cumulative work-related injury. After the first surgery, Wolf had only a fifty-pound lifting restriction, and he was able to continue with his job duties. The April 2001 MRI revealed "severe and accelerated disc degeneration," which had occurred since the April 1999 surgery. Wolf's job required repetitive heavy lifting. Dr. Millea gave the opinion that "Wolf's return to work following his surgery in Dubuque was a substantial and material aggravation of his lumbar spine problems." Dr. Neiman also gave the opinion that Wolf had an "increased level of impairment related to this injury that occurred at work related to repetitive trauma." The medical evidence supports the commissioner's finding that Wolf established an injury arising out of and in the course of his employment.

IV. Industrial Disability

SKW claims there is insufficient evidence to support the sixty percent industrial disability award to Wolf. It points out that Wolf is getting good grades in his classes, and states that due to his intelligence and good health his industrial disability rating should be lower.

Factual findings regarding the award of benefits are within the commissioner's discretion, and so we are bound by the commissioner's findings of fact if they are supported by substantial evidence. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464-65 (Iowa 2004). In considering industrial disability, the commissioner considered functional disability, as well as the employee's age, education, qualifications, experience, and the ability of the employee to engage in employment for which the employee is fitted. *Second Injury Fund v. Shank*, 516 N.W.2d 808, 813 (Iowa 1994).

We find there is substantial evidence in the record to support the industrial disability rating in this case. The deputy found:

> Keith Wolf is a high school graduate without further education. He is currently attending classes and doing well, and is clearly an intelligent man with the capability of improving himself educationally. . . . Wolf's work history is limited to agriculture and production work, most of it heavy. Given his current work restrictions, he is now limited essentially to sedentary work for which he has little education and no vocational background. His physical impairments are significant.

Based on these facts, the industrial disability award is supported by substantial evidence.

V. Apportionment

SKW asserts that Wolf had an earlier non-work related injury, and because of this they are entitled to apportionment under section 85.36(9)(c) (2001).[2] This section provides:

> In computing the compensation to be paid to any employee who, before the accident for which the employee claims compensation, was disabled and drawing compensation under the provisions of this chapter, the compensation for each subsequent injury shall be apportioned according to the proportion of disability caused by the respective injuries which the employee shall have suffered.

Iowa Code § 85.36(9)(c).

Apportionment for two work-related injuries is permitted by section 85.36(9)(c). *Excel Corp. v. Smithart*, 654 N.W.2d 891, 899 (Iowa 2002). The term "disabled" in the statute refers to an incapacity to work because of injury. *Mycogen Seeds,* 686 N.W.2d at 466. If an employee is receiving temporary or permanent benefits, or even healing period benefits at the time of the second injury, then apportionment applies. *Id.* This is true even if an employee is not receiving such benefits, but it entitled to receive them at the time of the second injury, because the benefits are retroactive to the date they are due. *Id.*

Wolf raises several arguments based upon *Bearce v. FMC Corp.*, 465 N.W.2d 531, 536 (Iowa 1991). The issues in *Bearce,* however, are based on the judicially created apportionment rule, which applies "where a prior injury or illness, unrelated to the employment, independently produces some

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[2] Section 85.36(9)(c) was repealed by the Iowa Legislature effective September 7, 2004. 2004 Iowa Acts, 1st Ex. Sess. ch. 1001, § 18. At the same time, the legislature enacted a modified apportionment rule in section 85.34(7). Section 85.36(9)(c) was still in effect at the time the present action was filed on January 29, 2002.

ascertainable portion of the ultimate industrial disability." *See Celotex Corp. v. Auten*, 541 N.W.2d 252, 255 (Iowa 1995). The legislative rule found in section 85.36(9)(c) "stands on its own, and is not affected by our exception involving prior injuries unrelated to employment." *Excel*, 654 N.W.2d at 900. Where the disability periods overlap, the apportionment rule of section 85.36(9)(c) applies. *Mycogen Seeds*, 686 N.W.2d at 466.

In a separate appeal, we determined Wolf suffered a cumulative injury on February 16, 1999, and was entitled to receive workers' compensation benefits for that injury. *SKW Biosystems v. Wolf*, No. 05-1373 (Iowa Ct. App. May 10, 2006). It is not clear from the decision, however, whether Wolf would have been entitled to be receiving benefits on the date of his second injury, which is the basis for this appeal. For this reason, we must remand to the commissioner for a determination of whether Wolf was entitled to receive workers' compensation benefits from the first injury at the time he suffered the second injury. If the disability periods overlap, then the apportionment rule would apply. *See Mycogen Seeds,* 686 N.W.2d at 466. We reverse the decision of the commissioner on the issue of apportionment, and remand for reconsideration of this issue.

VI. Credit

Finally, SKW contends that it is entitled to a credit against Wolf's workers' compensation benefits for benefits paid to him under the employer's short- and long-term disability plans. The commissioner determined Wolf did not adequately raise this issue at the administrative hearing. The district court

reversed the commissioner on this issue, finding that the issue was listed as disputed on a prehearing report. The court concluded the employer had failed to meet its burden to show it was entitled to a credit under section 85.38(2).

A similar situation regarding whether the credit had been raised as an issue by a notation in a prehearing report arose in *Krohn v. State*, 420 N.W.2d 463, 465 (Iowa 1988), where the supreme court stated:

> Krohn urges that the State should not be permitted to satisfy its obligations for medical and hospital expenses through the credit device outlined in section 85.38(2). This contention is premised on his assertion that the State waived its right to do so by indicating in a prehearing report form that a section 85.38(2) credit was not involved. We do not believe that this circumstance serves to deny the State the benefit of the statutory credit.

Thus, we conclude that even if the prehearing report did not note that a section 85.38(2) credit was in dispute, the issue would still be preserved because it was raised at the administrative hearing.

SKW had the burden of proving it was entitled to a credit. *See* Iowa R. App. P. 6.14(6)(*e*) (noting the burden of proof on an issue is upon the party who would suffer a loss if the issue were not established). SKW did not present the short- or long-term disability policies, and we determine it failed to present sufficient evidence to show it was entitled to the credit.

We affirm the decision of the district court, except that the issue of apportionment should be remanded to the workers' compensation commissioner.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.