

IN THE COURT OF APPEALS OF IOWA

No. 6-242 / 05-1111

Filed May 24, 2006

**BLUESTEM SOLID WASTE AGENCY and
UNITED HEARTLAND, INC.,**
Plaintiffs-Appellants,

vs.

RICK NUTZ,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Bluestem Solid Waste Agency and United Heartland, Inc. appeal the district court's ruling on petition for judicial review. **AFFIRMED.**

Joseph Barron and Lee Hook of Peddicord, Wharton, Spencer & Hook, L.L.P., Des Moines, for appellant.

Peter Leehey of Pete Leehey Law Firm, P.C., Cedar Rapids, for appellee.

Heard by Mahan, P.J., and Hecht and Eisenhauer, JJ.

MAHAN, P.J.

Bluestem Solid Waste Agency (Bluestem) and United Heartland, Inc. (United Heartland) appeal the district court's ruling on petition for judicial review. They argue the district court erred when it determined the worker's compensation commissioner properly issued a nunc pro tunc order to correct a previous settlement agreement authorization. We affirm.

I. Background Facts and Proceedings

Rick Nutz filed a petition with the Iowa Workers' Compensation Commission as the result of two injuries he allegedly sustained while working for Bluestem Solid Waste Agency. The first injury occurred on September 10, 1999, while the second occurred on January 28, 2002. ACE American Insurance Company (ACE) provided workers' compensation insurance for Bluestem for the first injury. United Heartland, Inc. provided workers' compensation insurance for Bluestem for the second injury. Both companies provided Bluestem's defense.

Nutz's attorney began negotiating with the insurance companies through a single letter addressed to both. Only ACE responded. On September 10, 2003, ACE offered to settle the first injury claim for \$29,290.50. Nutz's counsel emailed ACE indicating Nutz intended to settle with ACE, but would continue to pursue the claim against United Heartland for the second injury.

On November 12, 2003, Nutz and ACE filed a "Joint Application for Special Case Compromise Settlement." United Heartland did not appear in the caption, nor was it mentioned anywhere in the application or settlement documents. Both injuries, however, were mentioned in the application. Each was also attributed a sum of money. The workers' compensation commissioner

approved the settlement on November 13, 2003. A green summary sheet attached to the agency's settlement documents included a notation that the claim for the second injury against United Heartland remained open.

After Nutz settled with ACE and Bluestem, United Heartland and Bluestem continued to conduct discovery with respect to the second injury. On December 18, 2003, they filed a motion to compel discovery. On April 15, 2004, however, United Heartland and Bluestem filed an amendment to their answer to Nutz's original petition. They argued Nutz was precluded from pursuing his claim because the settlement approved on November 13, 2003 released Bluestem from further liability for the second injury.

Nutz and ACE sought to have the approved settlement corrected by filing a "Joint Application to Amend and Correct Joint Application and Order for Special Case Compromise Settlement." They argued the addition of the second injury to the settlement was an error. They claimed they never intended to negotiate a settlement for the second injury. On July 24, 2004, the deputy workers' compensation commissioner issued a nunc pro tunc order affirming the November 13, 2003 order, but indicating it only applied to the first injury.

United Heartland and Bluestem appealed the nunc pro tunc order to the commissioner. They argued the change was material, not a scrivener's error. They also argued the agency relinquished jurisdiction to make such a change once the original settlement order was approved. The commissioner affirmed the nunc pro tunc order. On judicial review, the district court affirmed the commissioner. United Heartland and Bluestem appeal.

II. Standard of Review

Our supreme court recently explained the standard of review for workers' compensation cases. See *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218-20 (2006). We apply the standards of Iowa Code section 17A.10 (2003) to the agency's decision to determine whether our conclusions are the same as those reached by the district court. *Univ. of Iowa Hosp. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004). As long as they are supported by substantial evidence in the record, we are bound by the agency's determination of fact. *Meyer*, 710 N.W.2d at 218. We give some discretion to the agency's application of law to fact, but these decisions may be affected by erroneous interpretation of law, irrational reasoning, failure to consider relevant facts, or irrational, illogical, or wholly unjustifiable application of law to the facts. *Id.* We afford no discretion when the agency exercises its decision based on an erroneous interpretation of law. *Id.*

The claim here appears to be framed as a challenge to the agency's findings of fact; namely, that there is not substantial evidence to conclude the parties did not intend to settle the January 28, 2002 injury. Therefore, we review to determine whether substantial evidence exists to affirm the agency's determination with regard to that fact. See Iowa Code § 17A.19(10)(f). However, Bluestem and United Heartland also challenge the agency's interpretation of the law; namely, that the agency improperly issued the nunc pro tunc. Therefore, we also review the agency's interpretation of the case law concerning nunc pro tunc orders. See *id.* §§ 17A.19(10)(b)-(c).

III. Merits

A. Substantial Evidence

Bluestem and United Heartland argue there is not substantial evidence to support the workers' compensation commissioner's decision that there was no intent to settle the January 28, 2002 injury. They argue the language of the settlement, which includes both the injury and an amount of settlement money, shows the parties actually intended to settle the matter. They also argue that Nutz read and signed the agreement, thus waiving the ability to continue his action for the January 28, 2002 injury.

However, "the question on appeal is not whether the evidence supports a different finding than the finding made by the commissioner, but whether the evidence supports the findings actually made." *Meyer*, 710 N.W.2d at 218 (internal quotations omitted). First, United Heartland was not included in the settlement agreement. Bluestem itself had a nominal role in its defense. The only representative it had in the settlement negotiations and agreement is the attorney who was also representing ACE. ACE, however, did not represent Bluestem for the January 28, 2002 injury. In short, United Heartland took no part whatsoever in the settlement negotiations or agreement. Second, Nutz, his attorney, and ACE's attorney all testified they did not intend to settle the January 28, 2002 injury. Third, an email between Nutz's attorney and ACE's attorney indicates Nutz intended to continue with the action against United Heartland and Bluestem for the second injury. Fourth, a green summary sheet attached to the settlement documents contained a notation indicating that the agency considered the action against United Heartland and Bluestem still open.

Finally, United Heartland itself continued to conduct discovery until April 2004, five months after it now claims the injury was settled. Therefore, we conclude there is substantial evidence to support the workers' compensation commissioner's decision that the parties did not intend to settle the January 28, 2002 injury.

B. Nunc Pro Tunc Order

"Nunc pro tunc" means literally "now for then." Black's Law Dictionary 1100 (8th ed. 2004). A nunc pro tunc order is a retrospective order issued by the court to "correct obvious errors or to make an order conform to the judge's original intent." *Freeman v. Ernst & Young*, 541 N.W.2d 890, 893 (Iowa 1995). The purpose of the order is not to modify or correct a judgment, but to make the record reflect the true judgment. *Id.* If the court must correct its judicial thinking, a judicial conclusion, or a mistake of law, the proper remedy must be found in some other procedure. *Graber v. Iowa Dist. Court*, 410 N.W.2d 224, 229 (Iowa 1987). In determining whether a nunc pro tunc was appropriate, we look to the judge's intent. *Id.* We also look to other factors such as the conduct of the judge and the counsel for both parties, "the words used by the court in its order, the nature of the alleged error, whether the matter had been previously called to the court's attention, and the length of time passing before the mistake's 'discovery.'" *Id.* at 229-30.

First, the parties' conduct indicates the inclusion of the January 28, 2002 injury was a mistake. It is highly unlikely that United Heartland and Bluestem would continue with discovery and pre-trial proceedings if they really believed they had settled the matter. Second, the deputy referred to the mistake as a

scrivener's error in her order. Third, if left uncorrected, the mistake would constitute extreme unfairness. United Heartland neither participated in settlement negotiations, nor appeared in any settlement documents. As the commissioner pointed out, the issue preclusion defense United Heartland presented against Nutz constitutes innovative thinking by counsel. Given United Heartland's lack of participation in settlement, however, we cannot view it as an attempt to enforce a right that United Heartland had previously contracted, intended, or expected to acquire. As the district court wrote:

It is more than apparent that United Heartland is boldly attempting to capitalize on an evident error made by ACE, Respondent Nutz, and the Workers' Compensation Commissioner. The error is screamingly evident as all of the parties that were actually involved in the settlement and its approval, including the agency, admit that it was error for the settlement to imply that Nutz's claim against Bluestem and United Heartland was settled and a mistake to refer to the January 28, 2002 injury. For United Heartland, who was not involved in the settlement proceedings, to now claim that an error was not made is incredulous.

Therefore, the inclusion of the January 28, 2002 injury in the settlement was a mistake properly rectified by a nunc pro tunc order.

United Heartland and Bluestem also argue the agency lacked jurisdiction to issue the nunc pro tunc order. An agency's approval and authorization of a settlement terminates that agency's subject matter jurisdiction. *See, e.g., United Fire & Cas. Co. v. St. Paul Fire & Marine Ins. Co.*, 677 N.W.2d 755, 761 (Iowa 2004). The problem with United Heartland's argument is twofold. First, United Heartland's argument makes the nunc pro tunc a nullity. If courts lost the jurisdiction to correct clerical errors in a final ruling, the nunc pro tunc would not exist. Second, to hold the agency lacked the jurisdiction to correct the error in

this case would unfairly deny Nutz his due process right to pursue his claim. See *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457, 461 (Iowa 1989) (noting there is a vested right in an accrued cause of action). We therefore conclude the workers' compensation commissioner retained jurisdiction for the purpose of issuing the nunc pro tunc order.

IV. Summary

We conclude (1) none of the parties intended to settle the January 28, 2002 injury and (2) the agency properly issued the nunc pro tunc order excluding that injury from the settlement approval. The district court's ruling is affirmed.

AFFIRMED.