IN THE COURT OF APPEALS OF IOWA

No. 6-300 / 05-0381
Filed September 7, 2006

DAVID EATON,
Petitioner-Appellant,

vs.

SECOND INJURY FUND OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

David Eaton appeals the district court's ruling on judicial review affirming the decision of the Iowa Workers' Compensation Commissioner denying his claim for benefits from the Second Injury Fund of Iowa. **AFFIRMED.**

Chris D. Spaulding of Berg, Rouse, Spaulding & Schmidt, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Shirley A. Steffe, Assistant Attorney General, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

MILLER, J.

David Eaton appeals the district court's ruling on judicial review affirming the decision of the Iowa Workers' Compensation Commissioner denying his claim for benefits from the Second Injury Fund of Iowa. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

On October 29, 2001, Eaton filed an original notice and petition with the Iowa Workers' Compensation Commissioner seeking benefits from his employer, Humeston Meat Processors (Humeston), and the Second Injury Fund of Iowa (the Fund) for what he described as a March 15, 2001 cumulative injury to his bilateral upper extremities. He sought recovery from the Fund under the provisions of Iowa Code section 85.63 et. seq. (2001), claiming entitlement to benefits based on an initial loss, to his left upper extremity on November 11, 1998, and a second loss, to his bilateral upper extremities, from the March 15, 2001 cumulative injury.

On January 30, 2002, the agency filed an order for Eaton to show cause why he had failed to file proper proof of service on Humeston. Eaton responded by requesting the agency dismiss Humeston with prejudice (although Eaton's response twice referred to dismissal "without prejudice," the "prayer" of the response in fact requested dismissal "with prejudice") and for the case to proceed solely against the Fund. A deputy commissioner granted Eaton's motion to dismiss Humeston, stating in dicta, "the employer is an unnecessary party to this second injury fund case." On March 25, 2002, Eaton filed a motion to amend his petition to change the second injury date from March 15, 2001, to March 15,

2000. His amended petition listed only the Fund and the State of Iowa as named respondents.

The case went to hearing before another deputy commissioner on April 9, 2003. Prior to submitting testimonial evidence the Fund requested the deputy to confirm two facts, that the file contained no first report of injury for a March 15, 2000 date, and that the file reflected no activity by Humeston and its insurance carrier. The deputy confirmed both of those points as correct. Based on that confirmation the Fund moved to dismiss the claim against it because subject matter jurisdiction was lacking or, in the alternative, the necessary prerequisites for an award of benefits from the fund were lacking. For reasons not related to the issues in this appeal the deputy voiced concerns that issue preclusion might bar any claim against the fund. However, for reasons of agency economy the deputy proceeded with the hearing but requested post-hearing briefs on both issue or claim preclusion and subject matter jurisdiction.[1]

The deputy commissioner filed her arbitration decision on June 9, 2003. She first found it had been the intent of the parties to a certain full commutation of remaining benefits that the commutation was to resolve only liability issues related to Eaton's November 11, 1998 injury and that the commutation did not relate to the alleged second injury of March 15, 2000. The deputy thus implicitly found that the commutation would not preclude Eaton from making a claim against the Fund for the second injury. However, the deputy concluded that

[1] In the Fund's post-hearing brief it acknowledged that lack of subject matter jurisdiction was not a valid ground to dismiss the petition, but argued issue preclusion had been established and continued to assert that the establishment of employer liability on the second alleged loss was a prerequisite to any Fund liability under section 85.64. The Fund asserted that because employer liability was and would be lacking Eaton's petition should be dismissed.

because Eaton had not established either Humeston's liability for a second loss or the degree of related disability Humeston would be obligated to pay for the second loss, he could not establish any liability of the Fund. The deputy concluded,

> Section 85.64 speaks of a second loss for which the employer is liable and for which the employer has made or will make disability payments. A finding of that second loss and a finding of the employer's liability on account of it are conditions precedent to any claim against the Second Injury Fund. That these findings must be established directly against the employer and not collaterally in an action against the Second Injury Fund only is necessary since the employer is the actual party in interest as regards to its liability for the asserted second loss and resulting disability.

In addition, the deputy determined the Fund would generally not have the early notice of the alleged second loss that section 85.23 compels an employee to give an employer, nor would it have the access to the employer's personnel or place of business that might be necessary to properly determine the circumstances of the injury. The deputy further concluded, in part:

> Hence, only the employer can make an early and full investigation as regards the employee's claim of a work injury. For that reason also, only the employer properly can be charged with either agreeing that the second injury occurred or fully defending against an employee's claim of an injury. To place that burden on The Fund by permitting claimant to bring action wholly against The Fund without the employer's liability [having] been previously established would significantly hinder The Fund's ability to defend against a claimant's asserted second loss. . . . Clearly, the legislature intended that Fund liability be triggered only upon a full showing of both the first and second loss. Such is only possible when the claimant has established either by an award of payments against the employer or by an agreement pursuant to section 86.13 with the employer that the employer is liable for the claimed compensable second loss.

Eaton appealed the deputy's arbitration decision and the commissioner, pursuant to sections 86.24 and 17A.15, summarily affirmed and adopted as final

agency action the arbitration decision. The commissioner added the following analysis.

> Without establishing the existence and extent of the employer's liability it is not possible to determine the Fund's liability. Since the employer is not obligated to pay, the Fund cannot commence paying "after the expiration of the full period provided by law for the payments thereof by the employer, ..."

Eaton then sought judicial review of the final agency action and the district court affirmed the commissioner's decision.

Eaton appeals the district court's ruling affirming the commissioner's denial of benefits from the Fund. As he did in the agency and district court below, Eaton contends on appeal that the employer is not a necessary party and he can proceed solely against the Fund because under section 85.64 he can prove employer liability for the second loss collaterally, without a prior admission or adjudication of employer liability for the alleged second loss. He argues there is no specific statutory requirement that he must recover workers' compensation benefits directly from the employer for the second loss in order to recover benefits from the Fund under section 85.64, and by not allowing him to establish employer liability collaterally an additional burden has been imposed upon him. The Fund argues section 85.64 clearly and plainly requires the establishment of employer liability, either by an adjudication or an admission, as a prerequisite to determining the liability of the Fund.

II. SCOPE AND STANDARDS OF REVIEW.

Iowa Code chapter 17A governs judicial review of decisions made by the workers' compensation commissioner. Iowa Code § 86.26. When the district court exercises its judicial review power it acts in an appellate capacity to correct

errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co*, 649 N.W.2d 744, 748 (Iowa 2002). Our review of the district court's decision requires application of the standards of Iowa Code section 17A.19(10) (2003) to determine whether our conclusions are the same as those of the district court. *P.D.S.I. v. Peterson*, 685 N.W.2d 627, 632 (Iowa 2004). If they are the same, we affirm; if not, we reverse. *Id*. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record, when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See id.* § 17A.19(10).

On judicial review, we are bound by the agency's findings of operative facts, so long as those findings are supported by substantial evidence in the record when the record is viewed as a whole. *See id*.; *Excel Corp. v. Smithart*, 654 N.W.2d 891, 896 (Iowa 2002). In contrast, for those issues involving the agency's interpretation of the law in cases in which the agency has not been vested with the final authority to interpret the law, we determine whether the agency's interpretation was erroneous and we may substitute our interpretation for the agency's. *See Clark v. Vicorp Rests., Inc*., 696 N.W.2d 596, 604 (Iowa 2005). Here, the agency has not been vested with the final authority to interpret the law regarding the criteria to establish section 85.64 (2001) liability and thus we do not defer to its interpretation of the law but rather are free to substitute our judgment de novo for the agency's interpretation. *See id.* (dealing with the law by which permanent partial disability benefits are awarded).

III. MERITS.

Iowa Code section 85.64 provides in relevant part:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "*Second Injury Fund*" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

In affirming the agency's denial of Eaton's claim for benefits the district court concluded, in part:

> Iowa Code section 85.64 contemplates and requires that the degree of disability applicable to the present employer or a settlement with that employer must be reached prior to allowing the Claimant to recover for additional damages from the Second Injury Fund. This interpretation is based [ ] upon the language of the statute which states "the employer shall be liable [only] for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability." Only after this determination and the expiration of the full payment period will a claim be paid from the Second Injury Fund.

We agree with the district court that it was the legislature's manifest intent in passing this statute to require the establishment of the employer's liability before allowing recovery from the Fund. Our supreme court has previously cited section 85.64 for the proposition that, "Unlike ordinary workers' compensation benefits, however, the Second Injury Fund's obligation cannot be assessed until the employer's liability is fixed." *Second Injury Fund v. Braden,* 459 N.W.2d 467, 473 (Iowa 1990). Accordingly, we agree with the commissioner and the district court that where, as here, there has been no prior adjudication or settlement

establishing the employer's liability the employer is a necessary party to the employee's action against the Fund.

Furthermore, we fully agree with and adopt as our own the district court's conclusion that

> Without the requisite involvement of the second employer, even if it be through settlement, [the employer's] interests would be unrepresented, which would inhibit a full determination of what portion of [the] claim should be paid by the second employer and what portions are left for the Second Injury Fund to compensate. To find otherwise would defeat both the letter and the purpose of the Second Injury Fund statutes.

As stated in the arbitration decision, the employer's liability must be established directly against the employer and not collaterally in an action against the Fund only, because the employer is an actual party in interest and the employer is in a better position than the Fund to make an early and full investigation of the employee's claimed work injury.

We note that because we have concluded it was the manifest intent of the legislature to require the determination of the liability of the second employer before allowing recovery from the Fund, we need not determine whether the *express language* of the statute *requires* the establishment of such liability as argued by the Fund. Our policy is to liberally construe workers' compensation statutes in favor of the worker. *Second Injury Fund v. Bergeson*, 526 N.W.2d 543, 547 (Iowa 1995). However, assuming without deciding that no *express language* in the statute imposes the requirement argued by the fund, just as the manifest intent of the legislature prevails over the literal import of the words used, *see State v. Anderson*, 636 N.W.2d 26, 35 (Iowa 2001), here the manifest intent of the legislature must prevail over the absence of an express requirement.

IV. CONCLUSION.

For all of the reasons set forth above, we conclude the district court was correct in affirming the agency's denial of Eaton's petition for benefits from the Second Injury Fund of Iowa.

AFFIRMED.