

IN THE COURT OF APPEALS OF IOWA

No. 6-313 / 05-1016
Filed July 12, 2006

**AMERICAN HOME PRODUCTS a/k/a
FORT DODGE ANIMAL HEALTH and
PACIFIC EMPLOYERS INSURANCE COMPANY,**
Petitioners-Appellants,

vs.

WILLIAM VOKES,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom,
Judge.

Petitioners appeal the district court decision which affirmed the workers'
compensation commissioners' award of medical benefits to respondent.

AFFIRMED.

Charles E. Cutler and M. Kathleen Brown of Cutler Law Firm, P.C., West
Des Moines, for appellants.

Pamela J. Walker of Sherinian & Walker Law Firm, West Des Moines, for
appellee.

Heard by Mahan, P.J., and Hecht, J., and Robinson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9208
(2005).

ROBINSON, S.J.***I. Background Facts & Proceedings***

William Vokes has worked at the same plant since 1964 as a stationary engineer. The plant was formerly owned by Solvay Animal Health. Since March 5, 1997, the plant has been owned by American Home Products. While working at the plant, Vokes was exposed to friable, or airborne, asbestos. Beginning on July 23, 1997, Vokes sought treatment for asbestosis and asbestos induced pleural fibrosis. Vokes does not have any medical restrictions and he continues to work at the same job.

In 1997 and 1999, Vokes filed claims for benefits under the Iowa Occupational Disease Law, Iowa Code chapter 85A (1999). A deputy workers' compensation commissioner found Vokes might be entitled to receive medical benefits. See Iowa Code § 85A.5 (providing that when an employee incurs an occupational disease, but is able to continue in employment, "the employee shall receive reasonable medical services therefore"). "[T]he employer in whose employment the employee was last injuriously exposed to the hazards of the disease, is liable for the compensation." Iowa Code § 85A.10. The deputy determined that because Vokes was unable to supply a date for his last injurious exposure to asbestos, he was not entitled to medical benefits.

The workers' compensation commissioner affirmed and adopted the deputy's decision. On judicial review, the district court determined the case should be remanded for a determination of whether Vokes's last injurious exposure occurred while he was employed by Solvay.

Vokes appealed, and the case was transferred to the Iowa Court of Appeals. We determined that because Vokes had an occupational disease, but was able to continue working, he was entitled to medical benefits under section 85A.5. *Vokes v. American Homes Prods.*, No. 02-1479 (Iowa Ct. App. Oct. 15, 2003). We determined the commissioner had improperly applied the last injurious exposure rule by requiring Vokes to supply a specific date when he was exposed. *Id.* We determined “it should be sufficient if the commissioner is able to determine who was the owner at the time of the incident.” *Id.* We remanded the case as to both American Home and Solvay for a determination of Vokes’s last injurious exposure prior to July 1997, when he first incurred medical expenses as a result of the occupational disease. *Id.*

On remand, the commissioner determined that “any exposure to the injurious substance that caused the occupational disease is an ‘injurious exposure, and the most recent exposure would constitute the “last injurious exposure.”” The commissioner noted it is often impossible to identify any particular exposure that is actually injurious. The commissioner found Vokes’s last injurious exposure to asbestos occurred while he was employed by American Home Products because Vokes continued to be exposed to friable asbestos at his workplace after March 5, 1997.

American Home Products sought judicial review, claiming the commissioner erred by misapplying the “last injurious exposure” rule. The district court took note of Vokes’s testimony which described several instances in which he was exposed to significant amounts of asbestos after March 5, 1997. It

also noted Dr. David Schwartz's opinion that "every exposure to asbestos is injurious." The court concluded "as defined in the statute, the 'last injurious exposure,' i.e. an exposure at a level sufficient to cause the disease, occurred after American Home purchased the plant and before July 1997." The court affirmed the decision of the commissioner. American Home Products now appeals.

II. Standard of Review

Our review is governed by the Iowa Administrative Procedure Act. Iowa Code § 17A.20 (2001); *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).

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).

III. Merits

The applicable portion of section 85A.10 provides:

If compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of the disease, is liable for the compensation.

The Iowa Supreme Court has interpreted section 85A.10, as follows:

Section 85A.10 imposes liability upon the last employer in whose employment the claimant was injuriously exposed to the hazardous condition of employment. It does not require that the claimant prove that his disease was actually caused by that exposure. Rather, we believe it is sufficient that he show that the hazardous employment condition which at some time caused his disease existed to the extent necessary to possibly cause the disease at his last employer's place of employment.

McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980).

Thus, a claimant must show "conditions existed at the last place he was employed in a concentration sufficient to cause the disease." *Doerfer Div. of CCA v. Nicol*, 359 N.W.2d 428, 432-33 (Iowa 1984). American Home Products contends the commissioner did not correctly apply this rule because the commissioner concluded "any exposure to the injurious substance that caused the occupational disease is an 'injurious exposure,'" and did not specify that the exposure must be in a concentration sufficient to cause the disease.

We note that Dr. Schwartz testified that every exposure to asbestos contributes to the disease of asbestosis. This statement supports the commissioner's finding that with asbestos, any exposure can be injurious and the last injurious exposure occurred after American Home purchased the plant and before July 1997.

We disagree the commissioner's decision "can be construed to rewrite or change the supreme court's interpretation of 'injurious exposure.' The commissioner applied a common-sense reading of Iowa Code section 85A.10, which fully comports with the language of the statute (employer where employee was last injuriously exposed to the hazards of the disease) and Iowa Supreme Court precedent. The commissioner specifically noted an incident where Vokes was exposed to a large amount of asbestos between March 5, 1997 and July 23, 1997. Vokes testified to an incident which probably occurred during the summer of 1997, when he swung around a pipe to step on top of a boiler, and his whole arm was covered with white powder asbestos. Vokes stated that after this the employer had asbestos abatement people in, but he thought they had missed "a whole bunch." The asbestos abatement people came back, but Vokes testified there was still a lot of equipment that had not been repaired.

There is substantial evidence in the record to support the finding that Vokes was exposed to asbestos during the time he was employed by American Home Products, and prior to the time he began treatment for his occupational disease. Also, there is substantial evidence the exposure was in concentrations which were injurious to him.

We affirm the decisions of the district court and the workers' compensation commissioner.

AFFIRMED.