IN THE COURT OF APPEALS OF IOWA

No. 6-419 / 05-0855
Filed October 25, 2006

SECOND INJURY FUND OF IOWA,
Petitioner-Appellant,

vs.

REBECCA GREENMAN,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane, II, Judge.

The Second Injury Fund of Iowa appeals the district court's order affirming the agency's final decision finding Rebecca Greenman was entitled to benefits from the Fund. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Thomas J. Miller, Attorney General, and Shirley A. Steffee, Assistant Attorney General, Tort Claims Division, for appellant.

Robert Rush of Rush & Nicholson, P.L.C., Cedar Rapids, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

The Second Injury Fund of Iowa (the Fund) appeals the district court's order affirming the Workers' Compensation Commissioner's decision granting Rebecca Greenman benefits from the Fund for injuries arising out of and in the course of her employment with Quaker Oats.

I. Background Facts and Proceedings

Rebecca Greenman began working for Quaker in 1972 as a production worker in the packaging department. Greenman held various positions at Quaker, including a slick line tender from 1989 to 2001. On April 17, 2001, Greenman's right arm was injured after repetitive lifting of tubes out of a packer. She was subsequently diagnosed with right lateral epicondylitis.

After the injury to her right arm, Greenman performed light duty work at Quaker, which included constant writing and typing. On September 24, 2001, Greenman reported an injury to her left arm, indicating it was weak and numb. Greenman opined in her accident report that the injury was from doing everything with her left arm that she previously did with both arms.

On October 10, 2001, Greenman was found to be at maximum medical improvement. Following a functional capacity evaluation, Dr. Ray F. Miller opined, "Ms. Greenman's major symptoms have been related to the right upper extremity with the left upper extremity symptoms occurring later and to a lesser extent." He determined she had a five percent permanent impairment rating to the right upper extremity and two percent impairment to the left upper extremity. F. Manshad, M.D.

opined Greenman had both a ten percent right and ten percent left upper extremity impairment.

On January 23, 2002, Greenman was "taken off work" due to major depressive disorder, with psychotic features. On April 1, 2002, Greenman attempted to return to work at Quaker, as she was released by Dr. Larsen, her psychiatrist, to return to work. However, Quaker sent her home because there was no work available within her physical restrictions and her previous position doing light-duty computer work had been assigned to someone else. Greenman testified that on April 3, 2002, she returned to Dr. Larsen and he indicated she was unable to work due to her mental condition. At the time of the hearing, Greenman was receiving social security disability benefits.

Greenman filed a claim seeking benefits from the Fund. Greenman settled her workers' compensation claims against Quaker for the April 17 injury to her right arm and the September 24 injury to her left arm. The agency approved the settlements on July 7, 2003.

Following a hearing on Greenman's claim against the Fund, the deputy commissioner found Dr. Miller's opinion persuasive. Dr. Miller opined that Greenman suffered a five percent permanent partial impairment to the right upper extremity and a two percent permanent partial impairment to the left upper extremity. The deputy also found Greenman's "bilateral hand/arm problems" did not occur over the same time period, but occurred separately, and did not extend to the body as a whole. Therefore, Fund liability was invoked.

The deputy found a seventy percent loss of earning capacity due to the combined effect of the April 17 and September 24 injuries and granted Greenman 350 weeks of permanent partial disability benefits to begin 17.5 weeks after October 10. The deputy held that "the full responsibility rule [was] applicable to assessment of liability" against the Fund. The deputy denied the Fund's motion for rehearing.

On appeal, the commissioner gave deference to the deputy's findings and found Greenman credible. The commissioner stated, "I find that Rebecca suffered the permanent impairment or loss of use to both of her arms (five percent on the right, two percent on the left) assessed by Dr. Miller due to her work at Quaker . . . [and] that Rebecca's bilateral hand/arm problems did not arise at the same time but rather occurred separately." He determined her initial injury was only to her right arm, and

> her left arm injury developed only after [she] was prompted by her right arm restrictions to overuse her left arm in the performance of her computer work for Quaker. The left arm was not injured by simple activities of daily living. This makes the left arm injury compensable in its own right primarily as a new injury even though it is somewhat in the nature of a sequela of the right arm injury because it probably would not have occurred if the right arm had not been injured.

The commissioner also stated, "[T]he fact of two separate injuries was established by the two disabilities having developed at different times and from different traumas. The left arm injury was not simply [a] sequela of the right arm condition because it developed from subsequent work-induced trauma, not merely as a consequence of the right arm condition." The commissioner found neither disability extended into the body as a whole, invoking Fund liability.

The commissioner agreed with the deputy that neither of the injuries caused Greenman's permanent aggravation to her mental state, leading to her inability to work due to mental problems, and any disability from her mental state was not the Fund's responsibility.

The commissioner found Greenman was not a likely candidate for retraining, given her age and her previous attempt to do computer work at Quaker. Prior to Quaker, her jobs were minimum wage, unskilled jobs. The commissioner found that prior to her injuries Greenman was fully employable in "very desirable employment." And, although the vocational counselor opined Greenman was unemployable following her injuries, "that status, if true, is largely due to her current mental state which is not work related." Therefore, "[f]rom examination of all of the factors of industrial disability, I find that the combined effect of the April 17, 2001 and September 24, 2001 injuries is a cause of a 70 percent loss of earning capacity."

The commissioner determined Greenman's settlements with Quaker for benefits were not binding on the Fund, but "the amount of the Fund's liability is determined based upon the payments that were actually paid." The commissioner granted Greenman 350 weeks of permanent partial disability benefits, but credited the Fund 66 weeks of compensation for the left arm injury based on her settlement with Quaker, and 12.5 weeks for the right arm injury based on the statutory schedule for such injury, making the total credit 78.5 weeks. Thus, Greenman was granted 271.5 weeks of compensation.

The commissioner found apportionment for Greenman's prior back related industrial disability was not appropriate, and the full responsibility rule was

applicable to assessment of liability against the Fund. "While the Fund is not an employer, the same rationale for the full responsibility rule and the fresh start rule, is applicable because the claimant in this case is not to be viewed as only part of a person after suffering a prior partial disability from her back injury."

The Fund filed a petition for judicial review of the commissioner's decision, which became the final agency decision. The district court affirmed the agency's decision. The Fund appeals.

II. Standard of Review

Our review of an industrial commissioner's decision is for correction of errors at law. *Simonson v. Snap-On Tools Corp.*, 588 N.W.2d 430, 434 (Iowa 1999). The industrial commissioner's conclusions of law are binding on us if supported by substantial evidence when the record is viewed as a whole. *Id*. We apply the standards of Iowa Code section 17A.19 (2001) to the agency action and determine whether our conclusions are consistent with those of the district court. *Brown v. Quik Trip Corp*., 641 N.W.2d 725, 727 (Iowa 2002).

III. Analysis

A. Separate and Distinct Injury

The Iowa Second Injury Fund compensates an injured worker for a permanent industrial disability resulting from the combined effect of two separate injuries to a scheduled member. Iowa Code §§ 85.63 – 85.69. To invoke Fund liability, there are three requirements: (1) permanent loss of use of a scheduled member; (2) permanent loss of use of another member through a compensable subsequent injury; and (3) permanent industrial disability to the body as a whole

arising from both the first and second injuries, which is greater in terms of relative weeks of compensation than the sum of the scheduled allowances for those injuries. *Second Injury Fund v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994). The Fund's proportional liability is triggered by the cumulative effect of the scheduled injuries resulting in industrial disability to the body as a whole, rather than the injuries considered in isolation. *Second Injury Fund v. Braden*, 459 N.W.2d 467, 470 (Iowa 1990).

The Fund asserts the district court erred in affirming the agency's rejection of the sequela theory. In other words, the Fund asserts there was insufficient evidence for the agency to find two separate and distinct injuries. Whether Greenman's injury to her left arm is a new and subsequent injury or one aggravated by the right arm injury is a judgment call, and judgment calls are to be left to the agency. *See IBP, Inc. v. Harpole*, 621 N.W.2d 410, 418 (Iowa 2001). There was substantial evidence in the record for the agency to find the injury to the left arm on September 24 was a separate and distinct injury. First, the injury to her left arm occurred at a different time than the injury to the right arm. The injury to the right arm occurred April 17, approximately five months prior to the injury to the left arm. Dr. Miller opined the symptoms related to the left arm occurred "later and to a lesser extent" than the right arm symptoms. And, there is no evidence Greenman complained of an injury to her left arm when the injury to her right arm occurred.

Second, Greenman was performing entirely different duties at Quaker when she injured her left arm than when she injured her right arm. Her right arm injury occurred when she was repeatedly lifting tubes out of a packer, while her left arm

injury occurred when she was doing light duty work and using a computer. The left arm injury was not just an increase in Greenman's disability caused by aggravating work activities; she suffered a separate and discrete injury to her left arm, subsequent to her right arm injury. *Cf. Excel Corp v. Smithart*, 654 N.W.2d 891, 897 (Iowa 2002) (holding subsequent back injuries resulting in a greater lifting restriction were not separate injuries). As stated by the commissioner and reflected by the evidence, "The left arm was not injured by simple activities of daily living. . . . The left arm injury . . . developed from subsequent work-induced trauma . . . ." Because the agency's decision was supported by substantial evidence, the district court did not err in affirming the decision with respect to whether the September 24 injury was a separate and distinct injury.

B. Industrial Disability Determination

The Fund asserts the district court erred in affirming the manner in which industrial disability was assessed as well as the amount of industrial disability. The Fund argues that the "full responsibility rule" does not apply to a claim for Fund benefits.

The full responsibility rule provides, "[W]hen there are two successive work-related injuries, the employer liable for the second injury 'is generally held liable for the entire disability resulting from the combination of prior disability and the present injury.'" *Excel*, 654 N.W.2d at 897 (quoting *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 265 (Iowa 1995)).

The Fund claims it should have received an apportionment for Greenman's work-related prior back injury, which occurred over twenty years ago and for which

she received permanent restrictions. The agency found "apportionment for the prior back related industrial disability is not appropriate in this case." The apportionment rule in effect at the time of the injury, Iowa Code section 85.36(9)(c),[1] provides:

> (c) 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.
>
> Paragraph "c" of this subsection shall not apply to compensable injuries arising under the second injury compensation Act.

First, even if there was evidence here that Greenman was "drawing" workers' compensation benefits for her back injury or that the compensation period for the back injury had not ended, *see Excel*, 654 N.W.2d at 899, the statute specifically provides that such apportionment does not apply to injuries arising under a claim for benefits to the Fund. *See* Iowa Code §§ 85.36(9)(c), 85.63 – 85.69.

Second, as noted by the agency, after her back injury Greenman successfully performed her job at Quaker for over 20 years and it was not until the injury on April 17 and the subsequent injury on September 24 that "the disability became devastating." The Iowa Supreme Court has said, "If the worker has resumed employment for the employer by performing the assigned work, there is no

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[1] The Iowa Legislature repealed subsection (c), effective September 7, 2004, and added subsection (7) to section 85.34 (new rule regarding apportionment for successive disabilities). *See* 2004 Iowa Acts, 1st Ex. Sess. ch. 1001, §§ 11, 12. However, subsection (c), as stated above, was still in effect at the time the injuries in the instant case occurred, and the statute in effect at the time of the injury is controlling. *See* 2004 Iowa Acts, 1st Ex. Sess. ch. 1001, § 18 (providing amendment applies to injuries occurring on or after September 7, 2004); *Brown v. Star Seeds, Inc.*, 614 N.W.2d 577, 581 (Iowa 2000) (holding statute in effect at time of injury is controlling).

reason to treat the worker as disabled in the event a second disabling injury is sustained." *Excel*, 654 N.W.2d at 898.

Finally, the agency also stated, "From examination of all of the factors of industrial disability, I find that the combined effect of *the April 17, 2001 and September 24, 2001 injuries is a cause of a 70 percent loss of earning capacity*." (Emphasis added.) It appears the agency only relied on the April 17 and September 24 injuries, not the back injury, in determining a 70 percent loss of earning capacity. Therefore, for all these reasons, the district court did not err in affirming the agency's manner of assessing industrial disability.

As for the determination that Greenman sustained a seventy percent industrial disability, such factual finding is binding on us if supported by substantial evidence. *Cargill, Inc. v. Conley*, 620 N.W.2d 496, 502 (Iowa 2000). Factors in determining industrial disability include the degree of functional disability; the employee's age, education, qualifications and experience; and the ability of the employee to engage in suitable employment. *Shank*, 516 N.W.2d at 815.

The commissioner considered the requisite factors in finding Greenman to have a seventy percent loss of earning capacity and rejecting the vocational counselor's recommendation that Greenman "is 100% precluded from the work force . . . ." Greenman was fifty-one years of age at the time of the deputy commissioner's decision. She has a high school degree and two semesters of education at a community college. Greenman's previous jobs were minimum wage, unskilled jobs, and even though Greenman could perform some of those jobs, the compensation package would be much lower than what she received at Quaker.

Substantial evidence supports the agency's final decision, and the district court did not err in affirming the decision.

C. Credit

The Fund asserts the district court erred in affirming the commissioner's credit for 78.5 weeks because the Fund should have received credit for 101.3596 weeks. The commissioner determined the Fund was entitled to credit for both scheduled losses. *See Braden*, 459 N.W.2d at 470 (finding the Fund is allowed credit for both compensable scheduled injuries which resulted in the industrial disability); *see also* Iowa Code § 85.64 (stating the Fund shall pay the employee "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"). For the first scheduled loss, the right arm, the commissioner granted the Fund 12.5 credit for weeks permanent partial disability, which is five percent of 250 weeks under the statutory schedule. *See* Iowa Code § 85.34. For the second scheduled loss, the left arm, the Fund received credit for sixty-six weeks, which is the amount agreed to under the settlement between Quaker and Greenman and the amount the commissioner found was actually paid. Thus, the commissioner determined the "compensable value" of the two scheduled losses was 78.5 weeks, resulting in the Fund paying 271.5 weeks of benefits (350–78.5=271.5). *See id*.

On appeal, we must determine whether the final agency decision, and the district court's affirmation of such, correctly interpreted "compensable value" under section 85.64. "Although we give limited deference to the industrial commissioner's

interpretation of the statutes governing his agency, the proper interpretation of the workers' compensation statute is a question of law for this court." *Nelson*, 544 N.W.2d at 264 (interpreting aspects of section 85.64).

The commissioner's findings equated to the notion that the "compensable value" for a scheduled loss pursuant to a section 85.35 settlement is the scheduled statutory value under section 85.34, and the "compensable value" for a scheduled loss pursuant to a full commutation settlement is the amount actually paid under the settlement. This determination of "compensable value" is inconsistent. The "compensable value" as required by section 85.64 should not be calculated differently for the two scheduled losses, despite the disparate methods of settlement.

The issue for this court then becomes what is the "compensable value" of the scheduled loss when the claim is adjudicated under a settlement. Is the compensable value the employer's scheduled statutory liability, or is it the amount of the settlement? The Iowa Supreme Court has stated, "An award from the Second Injury Fund is supplemental to workers' compensation benefits and is designed to provide an employee with additional compensation when disability is caused by two successive qualifying injuries." *Shine v. Iowa Dep't of Human Services*, 592 N.W.2d 684, 687 (Iowa 1999). We hold the compensable value of the scheduled loss for purposes of granting the Fund credit under section 85.64 is the amount of the settlement when the settlement is in excess of the employer's statutory liability under section 85.34.

Here, the commissioner erred in granting the Fund credit for the right arm based on the statutory liability when the settlement exceeded the statutory liability. The commissioner should have granted the Fund credit for 14.9977 weeks because the settlement for the April 17 right arm injury was $8,980.18 and the agreed weekly rate of compensation at trial was $598.77 ($8980.18/$598.77=14.9977). Therefore, the credit for the Fund should have been 14.9977 weeks for the right arm and 66 weeks for the left arm, resulting in a total credit of 80.9977 weeks. We reverse the district court's order affirming this portion of the final agency decision, and remand to the commissioner for entry of an order consistent with this opinion.

We affirm the order of the district court in all other respects.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.