

IN THE COURT OF APPEALS OF IOWA

No. 6-908 / 05-1963
Filed December 28, 2006

WILLIAM FLEMING,
Petitioner-Appellant,

vs.

**STIVERS DOWNTOWN LINCOLN-MERCURY
AND FARM BUREAU INSURANCE,**
Respondents-Appellees

Appeal from the Iowa District Court for Polk County, Robert J. Blink,
Judge.

A worker compensation claimant appeals from the district court's judicial
review of the agency decision regarding his claim. **AFFIRMED.**

Channing L. Dutton of Lawyer, Lawyer, Dutton & Drake, L.L.P., West Des
Moines, for appellant.

William D. Scherle and Alexander E. Wonio of Hansen, McClintock &
Riley, Des Moines, for appellee.

Heard by Huitink, P.J., and Zimmer, J., and Nelson, S.J.*

Decided by Huitink, P.J., and Vogel, J., and Zimmer, J., and Nelson, S.J.*

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

PER CURIAM

William Fleming appeals from the district court's decision on judicial review of the Iowa Workers' Compensation Commissioner's (Commissioner) decision to deny him benefits. We agree with the district court that a finding of an aggravation injury is not supported by substantial evidence, but that the Commissioner's ultimate conclusion that Fleming failed to prove a permanent disability arising from a work-related injury is supported by the record. We affirm.

I. Background Facts and Proceedings.

At the time of the hearing before the commission, Fleming was fifty-nine years old and had worked as an auto mechanic for Stivers Lincoln-Mercury since 1985. He had smoked two packs of cigarettes a day since he was age 18, but quit smoking in 1991.

During the winter of 1999 and early 2000, Fleming experienced symptoms including chest tightness, shortness of breath, and watering eyes. His family doctor, Gregory Ingle, D.O., initially suspected a heart attack or gastrointestinal acid reflux disease, but testing eliminated both. Fleming's symptoms abated until October 2000, when he was referred to a pulmonologist, Katrina Guest, M.D. In January 2001, Dr. Guest performed pulmonary function tests that showed a mild air flow obstruction. She initially believed Fleming suffered from "irritable airways probably sensitized to isocyanates or other components of the exposures at work."¹ A methacholine challenge test performed at this time was normal, however. Following his return to work and the induction of another episode,

¹ It was later determined that none of the chemicals to which Fleming may have been exposed at Stivers contained isocyanides.

additional pulmonary function tests performed by Dr. Guest had the same results as when Fleming was not experiencing symptoms. Fleming notified Stivers in January 2001 as to Dr. Guest's opinion.

Fleming continued to work in the service department at Stivers, although a respirator was provided to him to minimize exposure to any chemicals. The respirator irritated Fleming's eyes and face, however, and an allergist treating him took Fleming off of work on March 7, 2001. He remained off work until June 2002 and received temporary total disability benefits from Stivers during that period. In January 2002, Stivers sent Fleming to a pulmonology clinic in Denver, Colorado where he was seen by Ronald Balkisson, M.D. Dr. Balkisson conducted several tests, including blindfolded inhalation challenges to a number of chemicals Fleming identified as used by him at Stivers. The test results were essentially normal, with the exception of a mild vocal chord dysfunction, and another methacholine test showed normal airway response. Dr. Balkisson believed that Fleming suffered from chronic bronchitis more probable than not caused by a history of cigarette smoking and workplace chemical exposure, stating "It is my impression that Mr. Fleming certainly has some irritant related sensitivity to the various chemicals that are used in his workplace, but it does not seem likely there is a true type I hypersensitivity or allergic response." He attributed the vocal chord dysfunction to chemical exposure, acid reflux, and postnasal drip from rhinitis. He recommended Fleming be retrained or relocated to an area with minimal exposure to irritating chemicals.

Fleming returned to work at Stivers in June 2002, with another respirator provided to him to reduce his exposure to the chemical irritants. The respirator

proved difficult to wear due to its size, weight, and the positions in which Fleming needed to be in to accomplish his work duties as an auto mechanic. Fleming's family physician, Dr. Ingle, advised him to discontinue using the respirator because of the impact on his neck and spine. Fleming permanently left employment with Stivers on June 25, 2002, and filed a worker compensation claim the following March 2003. In preparation for hearing, another pulmonologist and colleague of Dr. Guest, Dr. Gregory Hicklin, reviewed Fleming's records but did not physically examine him. Dr. Hicklin believed that Fleming's history of smoking and acid reflux disease contributed to his respiratory complaints and that Fleming suffered no permanent injury from chemical exposure at Stivers. Dr. Guest later indicated her agreement with Dr. Hicklin's conclusions, through correspondence and her sworn deposition in May 2004. She stated that Fleming suffered solely from an irritation that temporarily produces a response, but that he does not have a cumulative, compounded, or acute permanent injury consistent with sensitization that increase in response with each additional exposure. Dr. Guest also believed that Fleming's responses to smelling certain chemicals he associated with his symptoms were emotional or psychological responses consistent with his history of panic disorder, and again, not from any physiological changes in his lung function. The record does not reflect that Fleming was ever assigned a level of loss of function or disability, just that he was to avoid exposure to the chemical irritants.

It was stipulated by the parties that at the time of his alleged injury, Fleming was grossing \$658.00 per week, or a weekly net pay of \$412.32. They also stipulated that Fleming received sixty-seven weeks of temporary total

disability benefits at the weekly rate of \$412.32 from Stivers. Following a contested hearing, the deputy commissioner found that the medical evidence showed Fleming's mild obstructive lung disease was more consistent with his chronic bronchitis and history of smoking. He also found more persuasive the medical testimony that Fleming's reactions were merely irritative or emotional responses, and not a cumulative sensitization that caused increased damage or loss of pulmonary function. Therefore, Fleming failed to establish that he sustained a work-related permanent injury and was denied compensation for total permanent disability benefits. On intra-agency appeal, the Commissioner affirmed and adopted the arbitration decision's findings of fact and conclusions of law with a few modifications: (1) Fleming's irritation was an aggravation of a preexisting condition and therefore a compensable work injury regardless of the cause of the preexisting condition; but (2) Fleming still failed to show the aggravation injury caused any permanent disability, because

Claimant argues that since this injury, he can never return to his chosen occupation, auto mechanic work, and therefore, he is entitled to permanent disability benefits. This is correct only if the claimant shows that his permanent restrictions are due to the injury and not the preexisting condition. Claimant argues in his brief that if he suffers a shoulder injury and is removed from a job requiring lifting 70 pounds because that type of lifting will increase his symptoms, he should be entitled to compensation for the loss of his job. He is correct if that injury, not a preexisting condition, caused the need to avoid lifting. If the shoulder condition was caused by a non-work related source, the loss of the job is not the result of the injury and is not compensated as a consequence of the injury.

The fume irritations were not shown by the experts to have been caused by an allergy acquired at work or that the risk of future irritations was increased by these irritations. The loss of claimant's occupation is the result of his preexisting condition. He is no more impaired or disabled now than he was before the injury occurred. The only difference is that he now knows that his preexisting

condition makes that type of work unsuitable for him. In view of his preexisting condition it never was suitable for him. The injury led to the discovery of the unsuitability but the injury did not cause the unsuitability.

Fleming then petitioned the district court for judicial review of the agency decision, arguing the Commissioner erred in failing to find permanent disability. Stivers argued on judicial review that the Commissioner erred in finding Fleming was injured. The district court reversed the Commissioner's finding that Fleming suffered an injury because of the lack of substantial evidence, but affirmed the finding that Fleming sustained no functional impairment for a permanent disability. Fleming now appeals from the decision on judicial review, contending the Commissioner's determination of an injury was supported by substantial evidence and because there was an injury with loss of earning capacity, benefits are due.

II. Scope and Standards 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). In exercising its judicial review power of a final agency decision, the district court acts in an appellate capacity to correct any errors of law by the agency. *Iowa Ag Const. Co., Inc. v. Iowa State Bd. of Tax Review*, 723 N.W.2d 167, 172 (Iowa 2006). When we review the district court's decision, "we apply the standards of chapter 17A to determine whether the conclusions we reach are the same as those of the district court." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464 (Iowa 2004). "If they are the same, we affirm; otherwise we reverse." *Id.*

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of our review in workers' compensation cases. Iowa Code § 86.26 (2003); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute and a party's substantial rights have been prejudiced. Iowa Code § 17A.19(10).

A court on judicial review is bound by the agency's fact-finding if it is supported by substantial evidence. Evidence is substantial for purposes of reviewing the decision of an administrative agency when a reasonable person could accept it as adequate to reach the same finding. *Asmus v. Waterloo Community School Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). The fact that two inconsistent conclusions may be drawn from the same evidence does not prevent the agency's findings from being supported by substantial evidence. *Id.* In situations in which the workers' compensation commissioner has rendered a finding that the claimant's evidence is insufficient to support the claim under applicable law, that negative finding may only be overturned if the contrary appears as a matter of law. *Id.*

III. Issue on Appeal.

Fleming argues on appeal that the district court erred on judicial review when it found substantial evidence did not support the Commissioner's decision and reversed the finding of injury. He also contends that if a finding of injury is properly supported, his evidence of loss of earning capacity amounts to an industrial disability and entitlement to benefits. The Commissioner found that Fleming's pulmonary irritation consisted of an aggravation of his preexisting

condition and therefore a compensable injury, regardless of the cause of the preexisting condition. Workers' compensation covers "[A]ll personal injuries sustained by an employee arising out of and in the course of the employment" Iowa Code § 85.3.

A personal injury, contemplated by the Iowa Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body. . . . Of course, such personal injury must be the result of the employment 'and flow from it as the inducing proximate cause.'

Black v. Creston Auto Co., 281 N.W. 189, 192-193 (Iowa 1938) (citations omitted). It is also a well-established principle that if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened or "lighted up" by an injury which arose out of and in the course of employment resulting in a disability found to exist, he would be accordingly entitled to compensation. *Dep't of Transp. v. Van Cannon*, 459 N.W.2d 900, 904 (Iowa Ct. App. 1990). Determining whether an injury or disease has a direct causal connection with the employment, or arose independently thereof, is essentially within the domain of expert testimony, and the weight to be given such an opinion is for the finder of the facts. *Id.*

The medical testimony presented before the agency was conclusive that Fleming suffers from a mild pulmonary obstruction. Doctors Guest and Hicklin believed the obstruction and Fleming's chronic bronchitis to have emanated from

his long history of smoking cigarettes, and not to his chemical exposure that they believed caused only an irritation and temporary reaction. Dr. Balkisson believed that Fleming suffered from chronic bronchitis more probable than not caused by a history of cigarette smoking *and* workplace chemical exposure. The Commissioner's decision accepted that Fleming suffered only from an irritation of his respiratory tract from chemical exposure at Stivers, but that the irritation was also "due to [Fleming's] preexisting condition." In other words, the preexisting condition leaves Fleming more susceptible to irritation by chemical exposure. The finding of an irritation, versus a permanent and cumulative chemical sensitization, is supported by the medical evidence and substantial evidence on the record. Whether the irritation is an aggravation of a pre-existing injury for purposes of the statute, however, is less clear. The Commissioner's finding of an irritation, as opposed to a sensitization, necessarily precludes the finding of an "injury" as the medical testimony does not support that a temporary irritation reaction "impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body." To the extent that the Commissioner found the temporary irritation reaction to be an injury that damages or destroys some function of the body, we conclude the record insubstantial to support such a finding. There is no medical testimony in the record that an irritation reaction causes damage to the body, but rather only a temporary, symptomatic response that resolves without permanent change to the body. Therefore, we agree with the district court that the Commissioner's finding that Fleming's temporary irritation reaction constitutes an aggravation injury is not supported by the record.

Regardless of whether the irritation suffered by Fleming was an injury, the Commissioner also determined that he failed to prove a permanent disability arising from his employment and not the preexisting condition. He found that the medical evidence did not support the fume irritations were caused by an allergy acquired at Stivers or that any increased risk of future irritation existed from the previous exposure. This is a somewhat inconsistent result with the Commissioner's earlier finding of an aggravation injury, but the ultimate conclusion is supported by the record. The Commissioner found that while Fleming's preexisting condition may leave him more susceptible to chemical irritation, it is the preexisting condition that actually makes the work unsuitable and prevents him from working as an auto mechanic. The medical evidence supports this conclusion, as presented by Doctors Guest and Hicklin who believed Fleming's mild pulmonary obstruction was a preexisting condition as the result of his history of smoking. We agree with the Commissioner's denial of benefits upon the conclusion that Fleming failed to prove permanent disability as a result of a work-related injury.

Our conclusions are thus the same as the district court; that the Commissioner's finding that Fleming suffered an injury is not supported by substantial evidence but the ultimate denial of benefits for failure to prove Fleming has suffered permanent disability from a work-related injury is supported by the evidence. In agreement with the district court, we affirm its decision on judicial review and the agency's denial of benefits.

AFFIRMED.