

IN THE COURT OF APPEALS OF IOWA

No. 7-405 / 06-1251
Filed July 12, 2007

JOHN J. BURICH,
Petitioner-Appellee/Cross-Appellant,

vs.

JOHN DEERE DES MOINES WORKS,
Respondent-Appellant/Cross-Appellee.

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

John Deere Des Moines Works appeals a district court ruling that reversed
the workers' compensation commissioner's denial of benefits. **REVERSED.**

Joseph A. Quinn of Nyemaster, Goode, West, Hansell & O'Brien, P.C.,
Des Moines, for appellant.

Randall P. Schueller of Hopkins and Huebner, P.C., Des Moines, and
John Dougherty, West Des Moines, for appellee.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

HUITINK, P.J.

This is an appeal from a decision by the district court reversing the workers' compensation commissioner's denial of benefits. John Deere Des Moines Works ("Deere") challenges the district court's determination that Burich suffered an injury arising out of and in the course of his employment. Burich cross-appeals, claiming the district court erred in rejecting his claim for penalties and interest and erred in rejecting his claim that the injury affected the body as a whole. Burich also claims Deere should not have been able to challenge whether the incident happened during the course of employment. We reverse the district court and reinstate the commissioner's decision denying benefits.

I. Facts and Prior Proceedings

Burich worked for Deere from 1972 until October 2003. He worked in numerous positions at Deere, many of which required repetitive use of his hands to grip materials and to operate power tools. In 1982 he had carpal tunnel release surgery on both arms. From 1988 through 1997 he complained of more problems with his right wrist and was treated with medications and a splint to wear on his wrist and hand.

On September 11, 2001, while he was on layoff from Deere, Burich helped his nephew pour a cement sidewalk. While pulling a two-by-four across the top to smooth out the forming cement, Burich felt a sharp pain in his right wrist. He described this pain as if someone had hit him in the wrist with an axe. From that point forward he had increased problems with his right wrist. He returned to work at Deere more than a month later. During the first three weeks of work, the pain

in his hand and wrist increased, so he went to Deere's medical department on November 20, 2001.

Burich told Deere medical personnel that he had radiating pain and weakness in his right hand. On an "Information-OSHA Form," Burich reported that he had first noticed his right hand problems four months earlier and that he was "assembling" when the injury occurred. Neither this form, the report prepared by the doctor, nor the notes written by the nurse mention the cement incident. Instead, the report indicated there was "no outside of work activities that involve forceful or repetitive hand use" and listed the condition as "work related." The doctor diagnosed right carpal tunnel syndrome. Burich was referred to Dr. James Boler, an orthopaedic surgeon.

On December 3, 2001, Burich saw Dr. Boler. Dr. Boler's report indicates the pain and discomfort in Burich's right hand started in 1995, and "since that time his symptoms have been getting worse." Dr. Boler's medical report did not reference or describe the cement incident. Dr. Boler concluded Burich had severe carpal tunnel syndrome in his right extremity. He recommended right carpal tunnel release and a tendon transplant for his thumb. Burich agreed to the carpal tunnel release surgery, but decided not to have the tendon transplant.

Burich's medical coverage was paid by Deere under workers' compensation. Deere also paid Burich temporary partial disability benefit payments while he was on restricted duty following surgery.

Burich's recovery was slow, and he was eventually referred to another doctor for pain management in September of 2002. In April of 2003 Burich met with a fourth doctor, Dr. Douglas Reagan, for a second opinion. This is the first

instance where a doctor's report mentions the cement incident. This report specifically states that the problem "started suddenly in September of 2001" while Burich was working on a cement project with a family member.

The carpal tunnel release surgery was not entirely effective, and Dr. Boler assigned Burich a twenty-six-percent permanent functional impairment to his right extremity.

On or about September 11, 2003, Burich filed a petition with the Iowa Workers' Compensation Commissioner alleging a November 20, 2001 cumulative injury to his bilateral upper extremity and body as a whole.¹ Deere filed an answer admitting that Burich had sustained a cumulative injury to his right upper extremity. However, on December 23, 2003, both parties signed a prehearing conference report indicating that the issues to be disputed at the hearing were whether Burich's injury arose out of an in the course of his employment, whether it was a cumulative trauma, and whether there was a causal relationship between the injury and the claimed disability. This report also indicated it was an amendment to the applicable pleading.

On November 30, 2004, a hearing was held before the deputy commissioner. At the hearing, Deere argued the injury was not work related and that Burich had initially misled doctors about the cause of the injury. Burich claimed he had told both Dr. Brown and Dr. Boler about the cement incident, but he was unable to explain why neither doctor included this information in their reports.

¹ Burich also filed a petition alleging an April 16, 2002 injury to his left knee. Both claims were addressed in the commissioner's decision.

On December 28, 2004, the deputy commissioner issued his arbitration decision finding Burich had not met his burden of proving his condition was the result of an injury arising out of and in the course of employment and that he was to take nothing on his right wrist claim.² The deputy found Burich had not originally informed his medical providers about the cement incident. Instead, he reported the symptoms were the result of work activities. The deputy further concluded the injury was the result of the cement incident. The commissioner affirmed the deputy's decision.

Burich filed a petition for judicial review with the district court. The trial court reversed the decision of the commissioner and remanded the case for determination of benefits. In so ruling, the district court stated:

Based upon the facts presented and Iowa law, this court cannot conclude that a one time incident of sharp pain, rather than an ongoing history of job-related carpal tunnel syndrome caused by repetitive activity and using power tools, is the cause of Mr. Burich's fourth and most severe carpal tunnel diagnosis. The substantial evidence presented, coupled with the legal determination that a cumulative injury is one which occurs over time and is compensable when the worker is no longer able to perform his job, requires that this court find Mr. Burich experienced a cumulative injury in the course of his employment for which he must be compensated.

Deere appeals, claiming the district court improperly acted as a trier of fact, rather than an appellate body, when it substituted its findings of fact for those of the commissioner. Burich cross-appeals, claiming the district court erred in rejecting his claim that the injury affected the body as a whole and his

² In the same ruling, Burich was awarded 4.4 weeks of benefits for the unrelated injury to his leg. That injury is not a subject of this appeal.

claim for additional awards for penalties and interest. Burich also contends Deere never amended its answer to dispute liability in this case.

II. Standard of Review

Our review of workers' compensation cases is governed by Iowa Code chapter 17A, the Iowa Administrative Procedure Act. Iowa Code § 86.26 (2005). Under the Iowa Administrative Procedure Act, a reviewing court may reverse the decision of the commissioner if it is unsupported by substantial evidence in the record or characterized by an abuse of discretion. *University of Iowa Hosp. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004). Our review, like that of the district court, is limited to correcting legal error. *Second Injury Fund of Iowa v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994). The commissioner, as the finder of fact, has the duty to weigh proffered testimony and determine its credibility. *Catalfo v. Firsetone Tire & Rubber Co.*, 213 N.W.2d 506, 509 (Iowa 1973). The findings of the commissioner are akin to a jury verdict, and we broadly apply them to uphold the commissioner's decision. *Shank*, 516 N.W.2d at 812.

III. Merits—Direct Appeal

The claimant has the burden to prove that the injury “arose out of” and “in the course of” employment. *Koehler Elec. v. Wills*, 608 N.W.2d 1, 3 (Iowa 2000). The issue on direct appeal is whether substantial evidence supports the commissioner's determination that the wrist and hand injury did not arise out of and in the course of his employment at Deere, but actually occurred when he worked with cement during a gap in employment.

We are bound by the commissioner's finding of fact if supported by substantial evidence in the record as a whole. *Meyer v. IBP, Inc.*, 710 N.W.2d

213, 218 (Iowa 2006). Therefore, 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.’” *Id.*

The district court relied upon Burich’s past incidents of carpal tunnel syndrome and the medical reports diagnosing the injury as carpal tunnel syndrome to conclude the current injury was work-related. The district court also faulted the commissioner for basing its decision “solely upon Mr. Burich’s testimony.” We conclude the district court failed to give the appropriate deference to the agency’s findings of fact in reaching its conclusion.

The record contains conflicting evidence about the injury that precipitated the symptoms and when the symptoms began. When Burich first reported the injury to medical staff at Deere in November 2001, he indicated the pain started four months ago when he was “assembling.” One month later, Burich told a different doctor that the pain started in 1995. Also, a different doctor’s report indicates the “problem started suddenly in September of 2001” while he was working on a cement project. This report also indicates Burich had problems in 1995, but he adjusted his “ergonomics” and “did well up until September 11, 2001”—the date of the cement incident.

Burich’s testimony at the hearing also suggested that the injury to his right wrist might not have arisen out of his employment:

Q. . . . [W]hy did you seek medical treatment [on November 20, 2001]? A. Because I was starting having problems with [my wrist and hand]. We were on a layoff and - - do you want me to go through the whole deal on that?

Q. Yes. A. Okay. We were on layoff. I was helping a nephew. I come late and they were pouring cement, and I finished off a sidewalk. It was approximately 2 and a half feet to 3 feet. And

all I did was just squeegeed it and put the 2-by-4, and I must have bent wrong, and it felt like I got hit with an axe, and I had a sharp pain. And so I stopped and went a little while, and then I finished up, and then I went home.

Q. Had you experienced that type of pain before? A. It depends on how you bent your hand. You would get the shocks, but this was like waking a sleeping giant, you know.

Q. And when you went in to see [the medical staff at Deere] on November 20th, had you been back to work for a period of time?

A. Probably three weeks. And it just started bothering me more and more, so I figured, you know, I better go get it looked at. Something's wrong.

He also testified his wrist never got back to the way it was before the cement incident.

While the medical reports presented by Burich diagnose the injury as carpal tunnel syndrome, these reports are also apparently based on incomplete or false information. The reports make no reference to the cement incident, but they reference Burich's claims that the injuries occurred while he was doing assembly work. Therefore, the commissioner's decision affords little weight to these medical reports, and concludes Burich did not prove the injury that gave rise to the current symptoms occurred in the course of employment. In light of the foregoing, we find the commissioner had a reasonable basis for this decision. See *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998) ("The commissioner, as the fact finder, determines the weight to be given to any expert testimony. Such weight depends on the accuracy of the facts relied upon by the expert and other surrounding circumstances."); see also *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995) ("When an expert's opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner.").

In total, the evidence concerning when the injury occurred was clearly contradictory. It was the commissioner's responsibility to sort through the conflicting evidence to reach a conclusion. While there may be evidence in the record to support a different conclusion, our review is limited to whether the evidence supports the commissioner's decision. Based on our review of the evidence, we conclude substantial evidence supports the findings made by the commissioner.

IV. Merits—Cross-Appeal

Burich claims Deere should not have been allowed to dispute whether his arm injury occurred in the course of employment because he was not given timely notice of this issue. We disagree. The prehearing conference report, dated and signed by both parties on December 23, 2003, clearly states that the issue of whether the injury arose in the course of employment was in dispute. Also, a "Hearing Assignment Order," sent to both parties on April 27, 2004, stated "the issues to be heard are those identified in the prehearing conference report." Burich had sufficient notice that the issue was in dispute. Therefore, we will not reverse the commissioner on this issue.

Because we find substantial evidence supports the commissioner's decision that the injury did not arise in the course of employment, there is no need to address the remaining arguments raised on cross-appeal.

V. Conclusion

Having considered all arguments made on appeal and cross-appeal, whether or not specifically mentioned in this opinion, we conclude the commissioner's decision denying compensation benefits is supported by

substantial evidence. Accordingly, we reverse the trial court's order and reaffirm the decision of the workers' compensation commissioner.

REVERSED.