

IN THE COURT OF APPEALS OF IOWA

No. 7-941 / 06-2001
Filed March 14, 2008

JOHN DEERE DES MOINES WORKS,
Petitioner-Appellant,

vs.

DOUGLAS GRAY,
Respondent-Appellee.

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

An employer appeals the award of workers' compensation benefits to an
employee. **AFFIRMED.**

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

Jason D. Neifert of Max Schott & Associates, P.C., Des Moines, for
appellee.

Considered by Miller, P.J., and Eisenhauer, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.

In this case, we are asked to determine if there is substantial evidence supporting the district court's conclusion that the workers' compensation commissioner was correct in determining the claimant's employer had adequate notice of the claimant's injury and whether the healing period was correctly assessed. We affirm.

I. Background Facts & Proceedings

Douglas Gray was employed on a job requiring heavy physical labor with John Deere Des Moines Works. Gray claims he received a cumulative injury to his right shoulder due to his work at John Deere.¹ Approximately once a week Gray met with a member of management and other employees in his department for Continuous Improvement Pay Plan (CIPP) meetings. Gray discussed his shoulder problem at these meetings.

Gray retired on April 30, 2002, when he was fifty-three years old. Gray testified he retired due to pain in his right shoulder, but he did not communicate this fact to his employer. Gray hoped his shoulder would get better after he retired, but instead it got worse. Gray had total right shoulder replacement on November 30, 2003, by Dr. Scott Neff. Dr. Neff gave the opinion that Gray's shoulder problems were caused by his employment with John Deere.

¹ Gray had a traumatic injury to his right shoulder on October 11, 1989, during his employment. He also complained of right shoulder pain in August 1993 and received treatment by the employer's medical department. Medical notes show Gray had treatment for left shoulder pain in September 1999, but Gray testified he believed this was actually for his right shoulder.

Gray later had biceps tendon repair surgery with Dr. Kyle Galles. Gray returned to work training assemblers at John Deere on September 24, 2004. This job has no physical requirements.

Gray filed a claim for workers' compensation benefits on April 1, 2004, giving as a date of injury April 30, 2002, the date he retired. The employer asserted the claim was untimely under Iowa Code section 85.23 (2003). After a hearing, a deputy workers' compensation commissioner determined the employer had actual notice of Gray's injury. The deputy stated, "It has been found that the employer had actual notice of the claimant's shoulder problems before the claimant retired through written reports of shoulder pain, and through verbal reports made during periodic meetings on performance improvement with his supervisor."

The deputy concluded Gray sustained a sixty percent permanent partial disability. The deputy also concluded Gray was entitled to healing period benefits until September 21, 2004, the date he returned to work.

The employer appealed the deputy's decision. The workers' compensation commissioner affirmed and adopted the deputy's decision as the final agency decision.² The commissioner added, "While there may be other evidence suggesting the claimant's shoulder problems were not his reasons for retirement, the presiding deputy decided to believe claimant when he testified that he retired earlier than he planned due to his shoulder pain." The commissioner stated he would respect the deputy's credibility determination.

² The decision was entered by a deputy workers' compensation commissioner pursuant to an order of delegation of authority by the workers' compensation commissioner under section 86.3.

The employer filed a petition for judicial review. The district court found there was substantial evidence in the record to support the commissioner's decision, and affirmed. John Deere appeals the decision of the district court.

II. Standard of Review

Our review is governed by the Administrative Procedure Act. Iowa Code ch. 17A (2005); *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 216 (Iowa 2004). We review the district court's decision by applying the standards of section 17A.19 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).

III. Timeliness

The employer claims Gray's claim was untimely under section 85.23 (2003), which provides:

Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

The date of occurrence in this case has been determined to be April 30, 2002, the date Gray retired. It is clear Gray did not give notice to the employer within ninety days of that date. The issue in this case is whether the employer had actual knowledge of the cumulative injury to Gray's right shoulder. Because lack of notice is an affirmative defense, the employer has the burden of proof on

this issue. See Iowa R. App. P. 6.14(6)(e); *DeLong v. Iowa State Highway Comm'n*, 229 Iowa 700, 703, 295 N.W. 91, 92 (1940).

To have actual knowledge an employer must have information that an injury might be work-related. *Robinson v. Iowa Dep't of Transp.*, 296 N.W.2d 809, 911 (Iowa 1980); *Johnson v. Int'l Paper Co.*, 530 N.W.2d 475, 477 (Iowa Ct. App. 1995). The purpose of the notice requirement in section 85.23 is to alert an employer to the possibility of a claim so it may investigate while the evidence is fresh. *Dillinger v. City of Sioux City*, 368 N.W.2d 176, 180 (Iowa 1985).

In the present case, the commissioner determined the employer had actual knowledge of Gray's injury. In this circumstance, we consider "not whether the evidence in the record will support a conclusion that [the employer] did not have actual knowledge, but whether the record contains substantial evidence to support the commissioner's finding that [the employer] had actual notice." *Doerfer Div. of CCA v. Nicol*, 359 N.W.2d 428, 435 (Iowa 1984).

We find there is substantial evidence in the record to support the commissioner's decision. Gray testified he informed a member of management of his shoulder problems during several CIPP meetings. Gray's testimony was corroborated by his co-employees Kenneth Keller and Joe Rumbaugh. Keller testified the CIPP meetings took place once a week, a supervisor and sometimes an engineer was present at the meetings, and at several meetings Gray complained that he had lots of pain in his shoulders while doing his work. Rumbaugh testified the meetings took place at least once a month, a team leader

and an engineer would be present, and Gray specifically complained about his shoulder during the meetings.

There is substantial evidence in the record to show Gray informed a supervisor of his developing shoulder injury, and that the supervisor would have known the injury arose from Gray's employment. We conclude there is substantial evidence in the record to show the employer had actual knowledge of Gray's injury. For this reason Gray's workers' compensation claim was not untimely under section 85.23.

IV. Healing Period Benefits

In considering the issue of healing period benefits, the deputy found:

[The employer] contends the healing period ended February 4, 2004, when the claimant reached maximum medical improvement and the claimant contends the healing period ended when the claimant returned to work on September 21, 2004. . . .

The record shows that although the claimant was placed on maximum medical improvement on February 4, 2004, but he was not able to return to work until September 21, 2004. Therefore his healing period is found to have ended when he returned to work.

This finding was adopted by the commissioner.

The employer claims the healing period benefits should end on February 4, 2004, when the deputy found Gray had reached maximum medical improvement. The employer points out that under section 85.34(1), healing period benefits end when an employee has returned to work or has reached maximum medical improvement, whichever occurs first.

In considering this issue, the district court found the commissioner was not stating Gray reached maximum medical improvement on February 4, 2004, but was simply reiterating the employer's argument before rejecting it. The court

found the commissioner was making a recitation, not a determination. The court noted the passive language, "was placed on," in reaching this conclusion.

We agree with the district court's conclusion. The evidence shows Gray continued to receive medical treatment after February 4, 2004. Gray was seen by Dr. Galles for an independent medical examination in March 2005, and subsequently had a right biceps tendon release performed by Dr. Galles. The evidence does not support a finding that Gray had reached maximum medical improvement by February 4, 2004, and therefore the earliest date to end healing period benefits would be the date he returned to work, September 24, 2004.

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

AFFIRMED.