IN THE COURT OF APPEALS OF IOWA

No. 8-993 / 08-0936
Filed March 11, 2009

ROBERT BRIDGE, JR.,
Petitioner-Appellant,

vs.

KARR TUCKPOINTING CO.,
Employer/Respondent-Appellee,

and

TRAVELERS INSURANCE CO.,
Insurance Carrier/Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Marsha Beckelman, Judge.

Former employee appeals from the ruling on judicial review from employee's workers' compensation action. **REVERSED AND REMANDED.**

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

John Swanson of Hansen, McClintock & Riley, Des Moines, for appellees.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

VOGEL, P.J.

Robert Bridge appeals from the district court's ruling on judicial review denying his claim for workers' compensation benefits arising out of his employment at Karr Tuckpointing Co. (Karr). We reverse and remand.

I. Background Facts and Proceedings.

Robert Bridge began working for Karr in 1985 as a tuckpointer; a physical job involving the use of grinding tools, sandblasters, air compressors, and mechanical lift equipment. Over the course of his employment, Bridge was also involved in sales and held a supervisory position. Bridge claimed he injured his left knee on May 17, 2002, while getting out of his truck at work. The next day he saw Brian Meeker, D.O., who assessed his condition as a ligament strain, recommended pain medication, as well as anti-inflammatory medication and the use of crutches. On May 24, 2002, Bridge followed up with Joseph Monahan III, D.O., who diagnosed Bridge with a "sprained left knee, possible medial meniscus injury," but noted he was "making progressive improvement," and placed no work restrictions on him. Because Bridge's knee continued to bother him, he saw Albert Coates, M.D., an orthopedic surgeon, on July 18, 2002. Dr. Coates examined the then forty-three year old, took x-rays, and determined his injury was degenerative arthritis. He gave Bridge glucosamine and chondroitin, hoping to alleviate the symptoms.

Bridge stopped working for Karr on December 22, 2003.[1] He did not see a doctor regarding his knee again until March 25, 2004, when he re-visited Dr.

[1] Karr disputes that Bridge stopped working for Karr, and claims he was on seasonal leave, as he called in every week inquiring about work.

Coates. In a May 27, 2004 letter to Bridge's attorney, Dr. Coates summarized his findings, noting that Bridge's degenerative arthritis had advanced, and suggested that he begin less physically demanding employment. He concluded "that the degenerative arthritis is not caused by his work but that it is materially aggravated and it is further my opinion that the necessity for arthroscopic surgery has been accelerated because of his type of work." Therapist Dr. Manshadi performed a functional capacity evaluation and concluded that Bridge had a sixteen percent total impairment of his left lower extremity.

Bridge filed a workers' compensation petition on May 10, 2004, alleging left leg/knee injuries on May 17, 2002, and July 18, 2002. An arbitration hearing before the deputy workers' compensation commissioner found as uncontradicted that Bridge had "sustained a cumulative injury or an aggravation of his degenerative condition" from his work at Karr, but denied his claim. The deputy found that Karr established the affirmative defense of lack of notice, stating that Iowa Code section 85.23 (2007) requires an employee to give notice of an injury within ninety days from the date of the occurrence, and Bridge's notice was not timely.[2] The deputy found that Bridge sought treatment for his left knee on July 18, 2002, which marked the date from which notice began to run. The commissioner affirmed this decision as did the district court on judicial review. Bridge now appeals, claiming the affirmative defense was not supported by

[2] Iowa Code § 85.23 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.

substantial evidence, as it was not until Dr. Coates evaluated him on March 25, 2004, that Bridge knew his condition would have a permanent adverse impact on his employment.

II. Scope and Standard of Review.

A district court reviews agency action pursuant to the Iowa Administrative Procedure Act. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001). When we review a district court decision reviewing agency action, our task is to determine if we would reach the same result as the district court in our application of the Act. *City of Des Moines v. Employment Appeal Bd.*, 722 N.W.2d 183, 189-90 (Iowa 2006). Our review of the commissioner's decision is for errors at law, not de novo. *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 330 (Iowa 2005). The district court or an appellate court can only grant relief from the commissioner's decision based upon a determination of fact by the commissioner that "is not supported by substantial evidence in the record before the court when that record is viewed as a whole." *Id.* (quoting Iowa Code § 17A.19(10)(f)). An agency's decision does not lack substantial evidence because inconsistent conclusions may be drawn from the same evidence. *Id.* at 331. An appellate court should not consider evidence insubstantial merely because the court may draw different conclusions from the record. *Fischer v. City of Sioux City*, 695 N.W.2d 31, 33-34 (Iowa 2005).

III. Cumulative Injury.

Bridge asserts that the agency erred in finding that he did not give timely notice of the injury to his left leg, and consequently for failing to award benefits for the founded sixteen percent loss of use of the leg. According to Iowa Code

section 85.23, if an employee does not meet the ninety-day notice requirement, then no compensation shall be allowed. The deputy commissioner found that Bridge suffered a cumulative injury or an aggravation of his degenerative condition, but then found there was insufficient evidence that Karr had actual knowledge of the injury, setting July 18, 2002, as the injury date. Bridge argues that while he injured his knee on May 17, 2002, sought medical treatment on May 18 and July 18, 2002, and was seasonally laid off in December 2003, it was not until Dr. Coates's evaluation in March 2004 that Bridge was aware of the probable compensable character of the injury.

A cumulative injury results from repetitive physical trauma in the workplace. *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 372-74 (Iowa 1985). In factually appropriate cases, liability exists for a disability that gradually develops over a period of time. *Id.* at 373 (citing 1B A. Larson, *Workmen's Compensation* § 39.10, at __ (1985)). In order to compute benefits, it is appropriate to fix the date of injury as of the time at which the "disability manifests itself." *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 829 (Iowa 1992). "Manifestation" is best characterized as "the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." *Id.* Further,

> upon the occurrence of these two circumstances, the injury is deemed to have occurred. Nonetheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the

> "nature, seriousness and probable compensable character of his injury" or condition.

Herrera v. IBP, Inc., 633 N.W.2d 284, 289 (Iowa 2001) (citing *Orr v. Lewis Cent. Sch. Dist.*, 298 N.W.2d 256, 257 (Iowa 1980)). The two-year period under section 85.26(1) and the ninety-day period for notice under section 85.23 both run from "the occurrence of the injury." *McKeever*, 379 N.W.2d. at 375; *see Orr*, 298 N.W.2d at 259.

Bridge asserts that he gave timely notice to Karr on May 10, 2004, when he gained knowledge of the seriousness and probable compensable nature of his injury. We agree. The deputy commissioner found that following his leg injury, Bridge sought treatment from Dr. Coates on July 18, 2002, who diagnosed him with "degenerative arthritis," and thus this date became the date of the cumulative injury. The commissioner added that when Bridge left the company in December 2003, he knew or should have known that his injury could permanently impact his employment. The district court affirmed, stating that Bridge "recognized the nature, seriousness, and probable compensable character of his left knee injury more than 90 days before he filed his claim."

The record includes the doctors' reports which shed light on when Bridge gained knowledge of his injury as it related to the adverse impact on his employment, and thus would warrant putting Karr on notice. When Bridge was initially injured in May 2002, neither Dr. Meeker, nor Dr. Monahan expressed concern that his knee injury caused any permanent damage such that his ability to perform his job would be more than temporarily affected. Dr. Monahan diagnosed him with a sprained left knee and a possible medial meniscus injury,

but noted he was "making progressive improvement." On July 18, 2002, Dr. Coates concluded Bridge's injury was "a classic picture of degenerative arthritis. It is still pretty early." He opined that "if he is not successful with the medication then we are probably looking at some 20 years before he really is looking at knee arthroplasty." These reports all indicate that Bridge's injury was a fairly minor condition. There was absolutely nothing in the reports dated May 18, May 24, or July 18, 2002, that would have alerted Bridge to the permanent adverse impact the knee injury would have on his employment.

Bridge re-visited Dr. Coates on March 25, 2004, who found that Bridge's degenerative arthritis had advanced. On May 27, 2004, Dr. Coates reported that he believed the degenerative arthritis was not caused by work, but was "materially aggravated . . . and the necessity for arthroscopic surgery has been accelerated because of his type of work." This report marks the first time that Bridge received a medical diagnosis indicating that his condition was permanent and would require surgery. See *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 865 (Iowa 2008) (affirming agency finding that claimant did not know the nature, seriousness and probable compensability of a shoulder injury for more than two years when she was not able to return to work and underwent surgical repair).

Following the diagnosis from Dr. Coates, Bridge reported his injury to Karr on May 10, 2004. Dr. Coates's May 27, 2004 written report is the first documentation linking the aggravation of Bridge's degenerative arthritis to his employment. Until this report, there was no indication that Bridge was alerted to the seriousness, and therefore probable compensable nature of his injury which

had aggravated his degenerative arthritis. *Johnson v. Heartland Specialty Foods*, 672 N.W.2d 326, 327 (Iowa 2003). Therefore we find that the agency did not have substantial evidence to find that the ninety-day period for notice of "the occurrence of the injury" under Iowa Code section 85.23 had run prior to the information Bridge received from Dr. Coates in March 2004.

We therefore reverse and remand to the industrial commissioner for further proceedings.

REVERSED AND REMANDED.