

IN THE COURT OF APPEALS OF IOWA

No. 9-461 / 08-2016
Filed August 6, 2009

CESAR ORTIZ, Deceased,
by his Surviving Spouse,
GUILLERMINA PONCE ACOSTA,
Petitioner-Appellant,

vs.

SWIFT & COMPANY,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Petitioner appeals the district court order affirming the decision of the workers' compensation commissioner denying her request for benefits as a surviving spouse. **AFFIRMED.**

Nathaniel R. Boulton of Hedberg Law Firm, P.C., Des Moines, for appellant.

Timothy W. Wegman and Joseph M. Barron of Peddicord, Wharton, Spencer & Hook, L.L.P., Des Moines, for appellee.

Considered by Vaitheswaran, P.J., Eisenhauer, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

ZIMMER, S.J.

Guillermina Ponce Acosta appeals the district court order affirming the decision of the worker's compensation commissioner denying her request for benefits as a surviving spouse. We affirm.

I. Background Facts and Proceedings

Guillermina Acosta married Cesar Ortiz in Mexico in 1997, and they have a son, Salvador, who was born in 1999. In 2000 Ortiz moved to Iowa, where he worked at Swift & Company, and his family remained in Mexico. On April 20, 2003, Ortiz was injured during the course of his employment by an ammonia leak. He continued to have respiratory problems and was unable to return to work.

Ortiz moved to El Paso, Texas, in March 2005. He lived there with his cousin, Nydia Akosima, but visited his family in Chihuahua, Mexico, about three and one-half hours away, fairly frequently. On May 5, 2005, Ortiz saw Dr. Rhett Jabour, a pulmonologist, in Las Cruces, New Mexico, complaining of shortness of breath with exertion, wheezing, and coughing. He denied chest pain, nausea, vomiting, and diarrhea. Dr. Jabour gave the assessment of "reactive airway disease induced asthma."

After his doctor's appointment, Ortiz went to Chihuahua to stay with his family for awhile. Acosta testified Ortiz became ill with a headache, diarrhea, vomiting, and sweating. She gave several differing accounts of his illness, actions, and statements during that time. On May 13, 2005, Ortiz was killed in a traffic accident on the road between Chihuahua and El Paso when his vehicle

crossed into the lane of oncoming traffic and was struck by a truck. There was no evidence drugs or alcohol were involved, and the weather was fine that day. There was evidence Ortiz had been driving at an excessive speed. Ortiz had a valid driver's license.

Acosta filed a claim for workers' compensation benefits as a surviving spouse, claiming Ortiz's work-related injury was the cause of his death. She claimed Ortiz was driving to El Paso or Las Cruces to seek medical treatment. After an administrative hearing, a deputy workers' compensation commissioner determined that injuries received during travel for medical care for a work-related injury can be a compensable consequence of the injury.

The deputy went on to find:

Guillermina did admit that she did not know where Cesar was going at the time of the accident. There is no evidence that he had a medical appointment or made any arrangements to be seen by a doctor in the United States.

The deputy concluded,

When all of the evidence is viewed in its entirety, it must be concluded that Guillermina has failed to sustain her burden of proof that Cesar's death occurred while he was traveling to obtain medical treatment for his work-related injury.

The deputy noted Ortiz's symptoms of diarrhea, vomiting, and sweating were not related to his work injury, and furthermore, there was no credible evidence he was traveling to obtain medical treatment. The deputy concluded Acosta was not entitled to benefits. The deputy's decision was affirmed and adopted by the commissioner.

Acosta filed a petition for judicial review. The district court agreed that Acosta's testimony contained inconsistencies, and that there was substantial evidence to support the commissioner's reasons for discrediting her testimony. The court also found there was no credible evidence Ortiz was traveling to obtain medical treatment. Furthermore, there was no evidence Ortiz's work-related injury contributed to the car accident. The court declined to find that injuries sustained when an employee is traveling to or from medical treatment for a work-related injury are considered to arise in the course of employment, and thus be compensable. The court noted that even if this theory was adopted, it would not apply under the facts of this case. The court affirmed the commissioner's decision. Acosta now appeals the decision of the district court.

II. Standard of Review

Our review is governed by the Iowa Administrative Procedure Act. Iowa Code ch. 17A; *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 decision 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. Merits

A. Acosta contends the record does not support the commissioner's finding that Ortiz's work-related injuries were not causally connected to his death. She states that her testimony was credible and consistent, and should not have been discounted. She also asserts that the record supports a finding Ortiz was

traveling to the United States for medical care at the time that he died. Furthermore, she claims Ortiz's work-related condition was a proximate cause of his fatal car accident.

We are bound by the commissioner's factual findings if they are supported by substantial evidence in the record as a whole. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). Evidence is substantial when a reasonable person could accept it as adequate to reach the same finding. *Asmus v. Waterloo Cmty Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). The ultimate question is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 420 (Iowa 2001).

Acosta offered several different theories about why Ortiz was driving on May 13, 2005, and where he might have been going. In a sworn statement on January 14, 2006, she stated Ortiz told her he had to go get his medication. She said her son told her that Ortiz had received a telephone call and he was leaving. She stated she got home before Ortiz left, and she believed he was going to pick up an oxygen machine in the United States. In the same statement, however, she stated Ortiz left before she got home. She stated Ortiz left to go to a hospital in El Paso, and he told her, "As soon as I arrive to the bridge, I've made it. A helicopter will pick me up and take me to the hospital."

In a deposition on October 23, 2006, Acosta testified Ortiz was going to "any hospital in El Paso, and then from there they would call his doctor." She

stated she did not have any specifics about a doctor's appointment on May 13, 2005.

At the administrative hearing on May 17, 2007, Acosta testified someone had called Ortiz and he had to go pick up something. She stated Ortiz left before she came home. She stated, "He was just telling me that he had to go for something and to the doctor, but I don't know exactly what he was going for." She stated, "I don't know if he was going to go to see a doctor in El Paso or if he was going to go all the way to Las Cruces." She stated, "I already said I don't know if he was going for a machine or if he was going to the doctor." She also testified she did not know if he planned to stop at his cousin's home in El Paso.

We find there is substantial evidence to support the commissioner's determination that Acosta had not shown Ortiz's death occurred while he was traveling to obtain medical treatment for a work-related injury. There is only speculation concerning what Ortiz might have been doing on the road between Chihuahua and El Paso on May 13, 2005. There was no evidence Ortiz had called a doctor in El Paso or Las Cruces, or made an appointment to see a doctor.

B. Acosta asserts the commissioner impliedly applied an improper legal standard by placing an improperly high standard of proof on her. She states she needed to show only by a preponderance of the evidence that the injury was work related. Acosta believes the commissioner required her to show a higher burden of proof.

A claimant has the burden of proof to show by a preponderance of the evidence a disability is causally connected to injuries arising out of and in the course of employment. *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148, 153 (Iowa 1997). “A possibility of causation is not sufficient; a probability is necessary.” *Sanchez v. Blue Bird Midwest*, 554 N.W.2d 283, 285 (Iowa Ct. App. 1996). The commissioner set forth the proper burden of proof, stating, “[i]n order for Guillermina to be entitled to death benefits, she must prove, by a preponderance of the evidence, that the work-related injury on April 20, 2003, was a proximate cause of Cesar’s death in the automobile accident on May 13, 2005.” We conclude Acosta has not shown the commissioner applied an improper burden of proof in this case.

C. Acosta asks the court to expand the law in Iowa by holding injuries received by an employee during travel for medical care for a work-related injury can be a compensable consequence of the injury. She supports her argument by reference to 1 Larson’s Workers’ Compensation Law section 10.07 (2008) (“When an employee suffers additional injuries because of an accident in the course of a journey to a doctor’s office occasioned by a compensable injury, the additional injuries are generally held compensable, although there is some *contra* authority.”).

Because there is no factual basis in this case to show that Ortiz was traveling in order to seek medical care for a work-related injury, there is no need to address the legal question of whether such a claim would be compensable if it

had been proven. We decline the invitation to further address the legal issue presented in this case.

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

AFFIRMED.