IN THE COURT OF APPEALS OF IOWA

No. 2-1199 / 12-1291
Filed February 27, 2013

BIG TOMATO PIZZA,
Petitioner-Appellant,

vs.

JONATHAN CLOUD,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Brad McCall, Judge.

An employer appeals the district court's decision affirming the award of workers' compensation benefits to petitioner by the workers' compensation commissioner. **AFFIRMED.**

Billy Joe Mallory and Allison M. Steuterman of Brick Gentry, P.C., West Des Moines, for appellant.

Nathaniel Randell Boulton of Hedberg & Boulton, P.C., Des Moines, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

An employer, Big Tomato Pizza, appeals the ruling of the district court that affirmed the decision of the workers' compensation commissioner that claimant Jonathan Cloud was entitled to workers' compensation benefits. The employer claims: (1) Cloud's injury did not arise out of his employment; (2) compensation should be barred by Iowa Code section 85.16 (2009); (3) Cloud was not entitled to medical expenses or workers' compensation benefits; and (4) the employer should not be responsible for pay for a mental health evaluation or treatment. We affirm the decisions of the district court and the workers' compensation commissioner.

I. Background Facts & Proceedings

Cloud was employed as a pizza delivery driver by Big Tomato Pizza, which is at 2613 Ingersoll Avenue in Des Moines.[1] In the evening on April 16, 2008, Cloud was returning from delivering a pizza when he heard a commotion coming from the front of Big Tomato Pizza. He got out of his car, and saw someone (later identified as Douglas Evans) being chased out of the door. Cloud stated he happened to step in Evans's way, and Evans struck him. Cloud reacted by defending himself and the two had a brief scuffle. Cloud testified that one night previously Evans had been panhandling in front of Big Tomato Pizza and Cloud asked him to leave, and this was his only prior interaction with Evans.

Cloud was injured as a result of the incident. He had difficulty breathing and asked a co-employee, Seth Wilson, to call 911. An ambulance picked Cloud

---

[1] Cloud began working for Big Tomato Pizza in June 1997, and left in March 2010 for reasons unrelated to his present claim.

up at 2613 Ingersoll Avenue, the address of Big Tomato Pizza, and took him to Iowa Methodist Medical Center. Cloud was diagnosed with a small puncture wound to the left side of his chest and a collapsed lung.[2] The emergency room medical report states, "pizza delivery tonight / walking into building / assaulted by man running out back door / altercation / punched @ axilla." Cloud remained in the hospital until April 26, 2008.

The Des Moines Police Department investigated the assault on Cloud.[3] The police report generated on April 16, 2008 states:

> Cloud (an employee @ "Big Tomato") was working when Evans walked by the business & yelled profanities. Another employee had made a threats report earlier in the week against same subject [ ]. Cloud went to confront Evans when a scuffle broke out & Cloud was punched in the left side, rib cage. Evans ran away & Cloud flagged me down because he was unable to breathe approximately 10 min. after the altercation. Rescue responded & transported him to the hospital.

The police report gives the address of the offense as the 2500 block of Ingersoll Avenue.

Cloud did not receive any subsequent medical treatment, stating he could not afford it because he did not have medical insurance. He returned to his employment as a pizza delivery driver for Big Tomato Pizza. He stated he continued to have pain in the left chest region, particularly if he lifted his left arm above chest level. He also sometimes experienced shortness of breath, which was exacerbated by cold, misty, or dusty conditions. Additionally, Cloud had problems with nightmares about the incident.

---

[2] Cloud had pre-existing emphysema and chronic obstructive pulmonary disease. He has a history of smoking cigarettes and marijuana prior to this incident.

[3] Evans subsequently pleaded guilty to assault with intent to cause serious injury.

On May 30, 2009, Cloud filed a claim seeking workers' compensation benefits. He had an independent medical examination on February 4, 2010, with Dr. John Kuhnlein. Dr. Kuhnlein found Cloud's pain was caused by the April 16, 2008 injury, and assigned a one percent whole person impairment. Dr. Kuhnlein recommended that Cloud only lift pizzas above shoulder height on an occasional basis. He also recommended that Cloud be examined by a mental health professional for possible post-traumatic stress disorder.

The case proceeded to a hearing before a deputy worker's compensation commissioner on May 13, 2010. Cloud testified as outlined above. The police report and Cloud's medical records were submitted into evidence.

The deposition of Wilson, Cloud's co-employee, was presented. Wilson stated Cloud was returning from delivering a pizza when he saw Wilson and another employee chasing Evans down the street. Wilson stated he was chasing Evans because he wanted to get into a fight. Wilson stated Cloud made a U-turn to follow Evans, got out of his car, and engaged in a fight with Evans in front of the China Buffet, which was in about the 2300 block of Ingersoll Avenue. Wilson stated that after the fight Cloud had a puncture wound in the chest and he could not breathe, so Wilson called 911.

John Limke, a co-owner of Big Tomato Pizza, testified that on April 16, 2008, he came into the business to get a pizza and was told that some of the employees were chasing a person. He stated Cloud came into the business while he was there and Cloud told him he had hit a guy in the head. Limke

stated Cloud seemed kind of excited. He testified that he heard later that night that Cloud had been taken to the hospital.

The deputy determined the testimony of Limke and Wilson was not as convincing as that of Cloud. The deputy concluded, "He was a victim of an assault that occurred because he was an employee. The injury arose out of and in the course of his employment." The deputy determined Cloud was not precluded from compensation under section 85.16. The deputy found Cloud had a fifteen percent industrial disability. The deputy also determined Cloud should be evaluated for a mental health injury as a result of the assault.

The employer appealed the deputy's decision. The workers' compensation commissioner found:

> The ambulance record, the police report and the Methodist medical report are objective, contemporaneous evidence of what occurred on the night of April 16, 2008. All three reports are more consistent with claimant's testimony than with the contrary reports of Mr. Lemke and Mr. Wilson.
>
> It is expressly found that Evans struck claimant in the chest on Ingersoll Avenue on or about where Big Tomato Pizza is located. The assault occurred as two other employees chased Evans, a panhandler who had previously caused problems at Big Tomato, from the store. When Evans assaulted claimant, claimant was performing the work duty of returning to the Big Tomato place of business after a pizza delivery to undertake or await another delivery.

The commissioner concluded Cloud had established an injury that arose out of and in the course of his employment.[4] The commissioner also found Cloud was not precluded from compensation by section 85.16. The commissioner affirmed

---

[4] The decision was actually made by a deputy workers' compensation commissioner who had been delegated by the workers' compensation commissioner to render the final agency decision in this case.

the deputy, but modified to reduce the industrial disability rating to ten percent. The commissioner found Cloud was "entitled to have these residuals evaluated by a mental health professional for the purpose of determining whether treatment is appropriate," and concluded the employer was liable for both the evaluation and any recommended course of treatment.

The employer filed a petition for judicial review. The district court determined there was substantial evidence in the record to support Cloud's account of the injury, and the findings of fact made by the commissioner should be affirmed. The court also found there was substantial evidence to support the finding of a ten percent industrial disability rating, and affirmed that finding as well. Additionally, the court affirmed the finding that the employer should be responsible for the cost of a mental health evaluation, and any recommended treatment. The employer appeals the decision of the district court.

II. Standard of Review

Our review of decisions of the workers' compensation commissioner is governed by Iowa Code chapter 17A. Iowa Code § 86.26. We review the commissioner's decision for the correction of errors at law, not de novo. *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 330 (Iowa 2005). We review the district court's decision by applying the standards of section 17A.19 to the commissioner's 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. Arising Out Of & In the Course Of

Under section 85.3(1) an employer is responsible under the workers' compensation law "for any and all personal injuries sustained by an employee arising out of and in the course of the employment." The terms "personal injury arising out of and in the course of the employment" is defined to include:

> injuries to employees whose services are being performed on, in, or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

Iowa Code § 85.61(7).

An employee has the burden to prove by a preponderance of the evidence that his injuries arose out of and in the course of his employment. *Quaker Oats v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996). An injury is considering to be arising out of employment "if there is a causal connection between the employment and the injury." *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 652 (Iowa 2000).

The phrase "in the course of" the employment refers to the time, place, and circumstances of the injury. *Great Rivers Med. Ctr. v. Vickers*, 753 N.W.2d 570, 574 (Iowa Ct. App. 2008). The Iowa Supreme Court has stated:

> [a]n injury occurs in the course of the employment when it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he

> is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (quoting *Bushing v. Iowa Ry. & Light Co.*, 226 N.W. 719, 723 (Iowa 1929)).

The employer contends there is not substantial evidence in the record to support the commissioner's determination that Cloud's injury arose out of or in the course of his employment with Big Tomato Pizza. It supports its argument by relying on the testimony of Wilson that as Cloud was returning from delivering a pizza he saw two co-employees chasing a man, made a U-turn in the street, got out of his car, and engaged in an altercation with Evans some blocks down the street from Big Tomato Pizza. The employer also imputes to Cloud Wilson's motivation of wanting to get into a fight. The employer contends Cloud deviated from the course of his employment by voluntarily engaging in an altercation some distance away from the restaurant.

On appeal, we do not consider whether the evidence supports factual findings different than the findings made by the commissioner, but instead consider whether the evidence supports the findings actually made. *Grant v. Iowa Dep't of Human Servs.*, 722 N.W.2d 169, 173 (Iowa 2006). We are bound by the commissioner's factual findings if those findings are supported by substantial evidence. *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 864 (Iowa 2008). Substantial evidence is "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue . . . ." Iowa Code § 17A.19(10)(f)(1). Evidence is

substantial if a reasonable mind would accept it as adequate to reach the same conclusion. *Asmus v. Waterloo Cmty. Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006).

The employer's argument that Cloud's injury did not arise out of or in the course of his employment relies on a factual scenario different than the factual findings made by the commissioner. As noted above, we do not consider whether the evidence would support different factual findings, but instead consider whether there is substantial evidence to support the findings actually made. *See Grant*, 722 N.W.2d at 173. The commissioner specifically found, "When Evans assaulted the claimant, claimant was performing the work duty of returning to the Big Tomato place of business after a pizza delivery to undertake or await another delivery."

We find the commissioner's factual findings on this issue are supported by substantial evidence. Cloud testified:

> As I pulled up and was exiting the vehicle, I heard a commotion coming from the front of the building. It sounded like inside. And as I got out of the car, I turned towards and at about that same time somebody looked like they were being chased out the door. I happen to step in front of the guy's way. He struck at me, and that's about it.

Cloud stated that when Evans swung at him he reacted by defending himself. In a deposition Cloud had stated that in the scuffle with Evans they "went down maybe a couple of doors on businesses." Cloud also stated, "I just happened to pull up into the middle of something that I didn't know what was going on." Cloud stated he did not remember much after Evans punched him.

Cloud's testimony is supported by the ambulance report showing he was picked up at the address of Big Tomato Pizza. His testimony is also supported by the medical report from the emergency room which stated, "pizza delivery tonight / walking into building / assaulted by man running out back door / altercation / punched @ axilla." Additionally, the police report from the evening of the incident states Cloud was working at Big Tomato Pizza and he "went to confront Evans when a scuffle broke out & Cloud was punched in the left side, rib cage." The police report gives the address of the incident as the 2500 block of Ingersoll Avenue.

We conclude there is substantial evidence in the record to support the commissioner's finding that Cloud's injury arose out of and in the course of his employment with Big Tomato Pizza. Cloud returned from delivering a pizza, which was part of his job duties, and walked into an incident already taking place. There is substantial evidence to show Cloud accidentally got in Evans's way, Evans struck him, and Cloud and Evans got into a brief scuffle, in which Cloud was injured. The evidence supports the commissioner's finding that, "When Evans assaulted the claimant, claimant was performing the work duty of returning to the Big Tomato place of business after a pizza delivery to undertake or await another delivery." Because Cloud was performing a work duty at the time he was injured, his injury arose out of and in the course of his employment. *See Quaker Oats*, 552 N.W.2d at 150.

IV. Section 85.16

The employer claims Cloud is not entitled to compensation based on section 85.16, which provides:

> No compensation under this chapter shall be allowed for an injury caused:
>
> 1. By the employee's willful intent to injure the employee's self or to willfully injure another.
>
> . . .
>
> 3. By the willful act of a third party directed against the employee for reasons personal to such employee.

An employee is barred from recovery if the employee substantially deviates from the employment, such as by engaging in horseplay. *See Xenia Rural Water Dist. v. Vegors*, 786 N.W.2d 250, 255 (Iowa 2010). Additionally, the application of section 85.16(3) "is limited to actions which are taken 'for reasons personal' to the employee and not as a consequence of the working environment." *Id.* at 259.

The commissioner found:

> There is no credible evidence that claimant wanted to willfully injure Mr. Evans or that Evans assaulted claimant for reasons personal to claimant. The convincing evidence is that claimant happened upon the confrontation between Evans and the other workers and Evans assaulted claimant because he was in Evans's way as Evans attempted to flee from his actual pursuers.

While the co-employee, Wilson, testified he was chasing Evans because he wanted to get into a fight, the commissioner did not credit Cloud with this same motivation. Substantial evidence to support the commissioner's determination is found in Cloud's testimony that he happened to get in Evans's way as Evans was leaving Big Tomato Pizza. Furthermore, there is no evidence Evans struck Cloud as a result of a relationship between the two that originated

outside of work. There is substantial evidence to show Cloud was not struck for reasons personal to Cloud, but Evans hit him because Cloud happened to get in his way. We conclude substantial evidence supports the commissioner's determination that Cloud was not precluded from receiving compensation based on section 85.16.

V. Workers' Compensation Benefits

The employer claims Cloud is not entitled to medical expenses, or temporary and permanent workers' compensation benefits. It claims Cloud has not shown any loss of earning capacity resulting from the injury. The employer points out that Cloud returned to his job as a pizza delivery driver for Big Tomato Pizza and continued in that job until he quit for other reasons. The employer states Cloud is entitled at most to a disability rating of one percent of the body as a whole.

An employee who has suffered an unscheduled injury which has resulted in a permanent disability is entitled to compensation based on his earning capacity. See Iowa Code § 85.34(2)(u); *Broadlawns Med. Ctr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010). The commissioner may consider not only an employee's functional disability, but also his age, education, qualifications, experience, and ability to engage in similar employment. *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 137-38 (Iowa 2010). The commissioner may find there has been a diminution in earning capacity, even when there has not been a diminution in actual earnings. *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 831 (Iowa 1992) ("[A] showing of actual diminution in earnings will not

always be necessary to demonstrate an injury-induced reduction in earning capacity.").

On this issue to the commissioner found:

> Claimant has a very modest permanent impairment and his only medical restriction is to lift at or above shoulder level only on an occasional basis. He has limited education and does not appear to be a good candidate for retraining. He has worked most of his adult life as a pizza delivery driver who receives wages only a few dollars an hour above minimum wage. Fortunately, he can continue that work. Nevertheless he must make some modifications in how he carries pizza and other items because of his injury and its sequela. Claimant does have some mild loss of earning capacity related to his injury and has sustained 10 percent permanent partial disability as a result of the injury.

We conclude there is substantial evidence in the record to support the commissioner's finding that Cloud has a ten percent permanent partial disability. Cloud was forty years old at the time of the workers' compensation hearing in May 2010. He quit school in the eleventh grade and obtained his G.E.D. He spent most of his adult life working as a pizza delivery driver, although he had done some other work for a temporary employment agency. Cloud testified he had difficulty reaching above shoulder level. Dr. Kuhnlein recommended that Cloud lift pizzas at or above shoulder height only on an occasional basis, and noted that he might have problems working in dust/mist or hot/cold environments. We agree with the district court, "There is substantial evidence to support the finding of 10 percent industrial disability and that finding should be affirmed."

VI. Mental Health Injury

Finally, the employer contends there was not substantial evidence in the record to support the commissioner's finding that Cloud was entitled to be

evaluated and treated for a mental health injury. The employer claims Cloud has failed to put forth any qualified expert opinion connecting an alleged mental injury to the April 16, 2008 incident. It asserts Dr. Kuhnlein is not a mental health professional.

The issue of medical causation is essentially within the domain of expert testimony. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). "Acceptance or rejection of an expert's testimony is within the 'peculiar province' of the industrial commissioner." *Morrison v. Century Eng'g*, 434 N.W.2d 874, 877 (Iowa 1989). We do not reweigh the evidence, but instead our review is limited to determining whether the commissioner's findings are supported by substantial evidence, viewing the record as a whole. *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 854 (Iowa 1995).

The commissioner found:

> Claimant has requested that alternate medical care be ordered by way of evaluation and possible treatment of the mental health symptoms, which he alleges result from his injury. The record evidence when considered in its entirety and when taking into account claimant's overall functioning prior to the April 16, 2008 assault is sufficient for a finding that claimant has mental and emotional residuals that are a direct consequence of his physical assault. Claimant is entitled to have these residuals evaluated by a mental health professional for the purpose of determining whether treatment is appropriate. The employer is liable under Iowa Code section 85.27 for the costs of both the evaluation and any recommended course of treatment.

Cloud discussed his mental health problems with Dr. Kuhnlein at the time of his independent medical examination. Dr. Kuhnlein found, "Cloud describes some symptoms suggestive of post-traumatic stress disorder, but I am not a mental health professional and would suggest that he be evaluated by a mental

health professional. Certainly the vivid dreams he describes, and the nightmares he describes are suggestive of this condition."

As the district court found, "While Dr. Kuhnlein is not a mental health professional, he is an M.D. with general medical training. Although he may not be an appropriate expert to diagnose a specific mental health condition, he is certainly qualified to recognize symptoms needing further investigation." We agree with the district court's conclusion. The commissioner was not finding based on the evidence presented in this case that Cloud had proven a mental health condition caused by his work-related injury, but only that there was sufficient evidence to warrant further investigation. We conclude there is substantial evidence in the record to support the commissioner's conclusion that Cloud should have an evaluation of his mental health condition, and then treatment if recommended by a mental health professional.

We affirm the decision of the district court affirming the decision of the workers' compensation commissioner that Cloud was entitled to workers' compensation benefits.

AFFIRMED.