IN THE COURT OF APPEALS OF IOWA

No. 6-907 / 05-1957
Filed December 28, 2006

SECOND INJURY FUND OF IOWA,
Petitioner-Appellant/Cross-Appellee,

vs.

JACKIE GEORGE,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

The Second Injury Fund of Iowa appeals the district court's ruling on judicial review affirming the workers' compensation commissioner's decision that the Fund had liability for Jackie George's industrial disability. **AFFIRMED AND REMANDED WITH DIRECTIONS.**

Thomas J. Miller, Attorney General, and Shirley A. Steffe, Assistant Attorney General, for appellant/cross-appellee.

Corey J.L. Walker of Walker & Billingsley, Newton, for appellee/cross-appellant.

Heard by Huitink, P.J., Zimmer, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

HUITINK, P.J.

The Second Injury Fund of Iowa (Fund) appeals the district court's ruling on judicial review affirming the workers' compensation commissioner's decision that the Fund had liability for Jackie George's industrial disability. We affirm.

I. Background Facts and Proceedings

The facts are largely undisputed. On June 21, 2000, George sustained a bilateral knee injury arising out of and in the course of her employment as a customer service engineer with Xerox Corporation, a position that entailed the repair and service of copiers. She underwent two surgeries and was given permanent work restrictions, including no lifting over thirty pounds, no kneeling, no squatting, no stairs, and no ladders. The restrictions precluded George from returning to her position at Xerox, and she was terminated.

In her petition in arbitration setting forth a claim against her employer and its insurance carrier for workers' compensation benefits,[1] George presented a claim for benefits under the Second Injury Compensation Act, Iowa Code section 85.63 et seq. (2001). She claimed three first losses: (1) September 1987 (bilateral carpal tunnel); (2) November 1993 (right hand, elbow and upper extremity); and (3) May 3, 1996 (left knee/leg). A hearing before the deputy workers' compensation commissioner was held in April 2003.

George was fifty-three years old at the time of the hearing. George testified she sustained a bilateral carpal tunnel injury while working as a meat

[1] George voluntarily dismissed without prejudice the claim against Xerox and its insurance carrier in March 2003. The employer had paid twenty weeks of benefits for a four-percent permanent partial disability to the body as a whole for the June 2000 injury, based upon a bilateral lower extremity impairment.

trimmer in 1987. She was uncertain of the impairment rating assigned following surgeries to treat the injury. George returned to work without restrictions after the surgeries, but was terminated after her hands began swelling and her doctor told her she could no longer perform that type of work.

While working for Xerox in 1993, George underwent surgery for carpal tunnel, a pinched nerve in her elbow, and a trigger finger, all in her right arm. George testified she received a five-percent impairment rating, but was uncertain whether it was to the hand or to the body as a whole. She was not placed under any permanent work restrictions as a result of the injury. George did not present any medical records or other evidence to support her testimony related to the 1987 and 1993 injuries.

George did present evidence related to the May 1996 injury to her left knee and leg. She tore the meniscus in her left knee and pinched a nerve in the groin of her left leg while employed with Xerox. She underwent surgery and received a seven-percent impairment rating to the lower extremity following the injury. Her treating physician released George to full duty in October 1996.

The deputy commissioner filed an arbitration decision in January 2004. He concluded George had failed to meet her burden of proof by a preponderance of the evidence that either the 1987 or the 1993 injuries resulted in a permanent injury or permanent disability. However, the deputy commissioner further concluded the May 1996 injury and the June 2000 injury were qualified first and second injuries, respectively, pursuant to Iowa Code section 85.64. After assessing the factors to be considered in determining industrial disability, including functional impairment, age, education, qualifications, work experience,

and ability to engage in employment for which she is fit, *see Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 605 (Iowa 2005), the deputy determined George had sustained a fifty-five-percent industrial disability to the body as a whole. Accordingly, the Fund was liable for the 239.6 weeks of benefits.[2]

The Fund appealed, seeking agency review of the deputy commissioner's decision. The workers' compensation commissioner filed an appeal decision in November 2004, affirming and adopting as final agency action "those portions of the proposed decision in this matter that related to issues properly raised on intra-agency appeal," and including some "additional analysis." Specifically, the commissioner determined:

> [T]he damage from the [1996] injury had actually caused a loss of use of the left leg as demonstrated by the impairment rating. In the present injury, claimant's right leg was also damaged and constitutes a qualifying loss. In fact, the Second Injury Fund received credit for the full compensable value of the left leg disability.
>
> The present injury contributed the overwhelming majority of the industrial disability. However, it cannot be accurately said that the first contributed nothing whatsoever. The deputy correctly found a combined effect. Even in the absence of a combined effect, the terms of the statute are controlling. Claimant had a qualifying first loss and a subsequent loss that triggered the benefit from the Second Injury Fund.

The commissioner further determined "[t]here is ample evidence in the record to support a finding of qualifying losses in 1987 and 1993. . . . So long as a prior loss of use is established and some measure of degree can be placed upon it,

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[2] The total of 239.6 weeks liability for the Fund is equal to 275 weeks of permanent partial disability benefits for fifty-five-percent industrial disability to the body as a whole, minus twenty weeks received for the second injury and 15.4 weeks received for the first injury. *See Second Injury Fund v. Braden*, 459 N.W.2d 467, 471 (Iowa 1990) ("[W]here both injuries are scheduled, . . . the Fund is liable for the entire amount of the industrial disability minus the two scheduled amounts.").

even if only by the judgment of the deputy, a qualifying first loss can be established."

The Fund sought judicial review of the agency action in district court. In a ruling on the petition for judicial review, filed in November 2005, the district court affirmed the agency's decision.

The Fund appeals the district court's ruling on its petition for judicial review, arguing the district court erred in (1) affirming the agency's conclusion that a bilateral simultaneous injury under section 85.34(2)(s) is a qualifying loss under section 85.64, (2) affirming the agency's conclusion that the May 1996 left leg injury was a qualifying loss under section 85.64, and (3) affirming the manner in which the agency assessed industrial disability. George cross-appeals, arguing the district court erred in granting the Fund's motion to stay and not requiring the Fund to post a bond.

II. Standard of Review

Our review is governed by the Iowa Administrative Procedure Act, Iowa Code chapter 17A (2003). *See* Iowa Code § 86.26 (2001). The district court functions in an appellate capacity in exercising its judicial review power. *Hill v. Fleetguard, Inc.,* 705 N.W.2d 665, 669 (Iowa 2005). When reviewing the district court's decision, we apply the standards of chapter 17A to determine whether the conclusions we reach are the same as those of the district court. *Id.* We affirm if the conclusions are the same; otherwise we reverse. *Id.* The agency's findings of fact are binding on us if they are supported by substantial evidence. *Fears v. Iowa Dep't of Human Servs.,* 382 N.W.2d 473, 475 (Iowa Ct. App. 1985). "In reviewing the commissioner's interpretation of the statutes governing the agency,

we defer to the expertise of the agency, but reserve for ourselves the final interpretation of the law." *Second Injury Fund v. Bergeson*, 526 N.W.2d 543, 546 (Iowa 1995).

III. Second Fund Injury Liability

The purpose of the Second Injury Compensation Act, codified at Iowa Code sections 85.63 through 85.69, is to encourage the employment of disabled individuals. *Bergeson*, 526 N.W.2d at 547. Section 85.64 limits the employer's liability in the event an employee suffers a specified second injury. *Id.* The statute provides in pertinent part as follows:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the *"Second Injury Fund"* created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Iowa Code § 85.64. Thus, the employee must prove the following to trigger the liability of the fund:

> (1) the employee has either lost or lost the use of a hand, arm, foot, leg, or eyes;
> (2) the employee sustained the loss, or loss of use of another such member or organ through a work-related injury; and
> (3) there is some permanent disability from the injuries.

Haynes v. Second Injury Fund, 547 N.W.2d 11, 13 (Iowa Ct. App. 1996). When these three circumstances are present, "the Fund becomes responsible for the difference between the compensation for which the current employer is liable and

the total amount of industrial disability suffered by the employee, reduced by the compensable value of the first injury." *Id.*

A. Whether a Bilateral Simultaneous Injury Under Section 85.34(2)(s) is a Qualifying Loss Under Section 85.64

Iowa Code section 85.34(2) provides a schedule of benefits for injuries to specific members of the body, including fingers, toes, hands, feet, arms, legs, and eyes.[3] *See* Iowa Code § 85.34(2)(a)-(t). Specifically, section 85.34(2)(s) provides compensation for "[t]he loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident . . . ." Section 85.64 requires two scheduled injuries to invoke Fund liability. *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 270 (Iowa 1995).

As mentioned, George claimed her second loss for purposes of section 85.64 was the June 2000 injury to her bilateral lower extremities, compensated under section 85.34(2)(s). The Fund contends a bilateral injury under section 85.34(2)(s) is not an injury to a scheduled part under section 85.64 because the statute refers to "one leg" and "another such member." The Fund argues the agency and the district court erred in concluding otherwise.

Our primary purpose in statutory construction is to determine legislative intent. *State v. Iowa Dist. Ct.,* 630 N.W.2d 778, 781 (Iowa 2001). We determine intent from the words used by the legislature. *Id.* When text of the statute is plain and its meaning clear, we are not permitted to search for meaning beyond its express terms. *State v. Tesch,* 704 N.W.2d 440, 451 (Iowa 2005). The plain

[3] Knees are treated as portions of the leg. James R. Lawyer & Judith Ann Graves Higgs, 15 Iowa Practice *Workers' Compensation* § 13:4, at 136 (2006).

language or plain meaning of a statute "is not limited to the meaning of individual terms, but rather, such inquiry requires examining the text of the statute as a whole by considering its context, object, and policy." *Forbes v. Hadenfeldt,* 648 N.W.2d 124, 126 (Iowa 2002). "[W]e must avoid legislating in our own right and placing upon statutory language a strained, impractical, or absurd construction." *Anderson v. Second Injury Fund*, 262 N.W.2d 789, 791 (Iowa 1978) (citation omitted).

After examining the statute as a whole, and considering its object and policy, we conclude the Fund's position that the statute applies only to injuries of a single scheduled member would lead to impractical and absurd results. As the district court explained in its ruling on judicial review,

> If George had injured only her right knee in the second accident, she would unquestionably be entitled to Fund benefits, but she would be denied such benefits because she injured *both* knees in the same accident. Further, under the Fund's position, George would be entitled to benefits if her second injury was only to one hand, for example, but she would be denied such benefits if she injured *both* hands or if she suffered any bilateral injury to a scheduled member.

The legislature could not have intended for an injured worker with only one impaired scheduled member to be placed in a better position than a more severely injured worker with bilateral injuries. Therefore, we conclude that a bilateral simultaneous injury under section 85.34(2)(s) is a qualifying loss under section 85.64. Accordingly, we affirm the district court's and the agency's determination that George's bilateral knee injury qualified her for Fund benefits.

B. Whether the May 1996 Left Leg Injury was a Qualifying Loss Under Section 85.64

As mentioned, the commissioner and the district court concluded George's May 1996 injury to her left knee constituted a qualified first injury under section 85.64. The Fund argues the evidence fails to show George had a permanent disability to her left knee at the time her second injury occurred; therefore, there was no prior loss of a scheduled member and no qualifying loss under section 85.64.

George was released to full duty following her May 1996 injury and continued in the same employment with Xerox. She had no permanent work restrictions, and her salary steadily increased. However, "[t]o invoke Fund liability, the first injury need only be a scheduled injury." *Bergeson*, 526 N.W.2d at 548. The first injury need not result in an industrial disability to constitute a "loss of use" under section 85.64. *Id.* It is undisputed that George had a seven-percent impairment rating to her lower left extremity following the 1996 injury, for which she received 15.4 weeks of permanent partial disability benefits. Accordingly, substantial evidence supports the agency's conclusion that the 1996 injury was a scheduled injury resulting in a functional impairment, and therefore was a qualifying first injury for purposes of section 85.64.

C. The Manner in Which the Agency Assessed Industrial Disability

The Fund argues the agency erred in assessing industrial disability by failing to make a determination of the combined effects of the first and second loss. Essentially, the Fund contends George was required to show, and the agency to find, that the 1996 injury combined with the June 2000 injury to bring

about industrial disability. According to the Fund, the agency must be reversed because "[t]here was no combined effect determination and in any event, no such determination could find substantial evidentiary support."

"It is the *cumulative* effect of scheduled injuries resulting in industrial disability to the body as a whole—rather than the injuries considered in isolation—that triggers the Fund's proportional liability." *Bergeson*, 526 N.W.2d at 548 (citations omitted). The commissioner concluded, "The present injury contributed the overwhelming majority of the industrial disability. However, it cannot be accurately said that the first [injury] contributed nothing whatsoever." The agency was not required to determine the exact degree to which each of the injuries contributed to the overall disability. George met her burden of proving the elements necessary to establish eligibility for Fund benefits. *See Haynes*, 547 N.W.2d at 13. The agency properly considered the applicable factors in determining industrial disability, and its findings are supported by substantial evidence. Accordingly, we affirm on this issue.

IV. Cross-Appeal

After the Fund filed its petition for judicial review in district court, George filed an application for judgment pursuant to Iowa Code section 86.42. The Fund filed a resistance to the application for judgment and a motion for stay of agency action. *See* Iowa Code §§ 17A.19(5), 86.26 (2003). George resisted the motion for a stay. Following a hearing, the district court granted the Fund's motion.

Following the district court's ruling affirming the agency's decision, filed on November 15, 2005, George filed a "reinstatement of her application for judgment pursuant to Iowa Code section 86.42 and motion to lift stay." The Fund

filed its notice of appeal, along with a motion to continue the district court's stay of an award of benefits without filing a supersedeas bond, pursuant to Iowa Rule of Appellate Procedure 6.7(3),[4] and a resistance to George's application for judgment and motion to lift the stay. On June 8, 2005, the district court filed an order granting the Fund's motion to continue stay of award benefits without filing bond. In her cross-appeal, George argues the district court erred in granting the motions to stay, and not requiring the Fund to post a bond. We review for an abuse of discretion. *Glowacki v. State Bd. of Med. Exam'rs*, 501 N.W.2d 539, 541 (Iowa 1993).

Discussion

Iowa Code section 17A.19(5) allows a party to request a stay of agency action pending the outcome of judicial review proceedings. In determining the appropriateness of a stay, the district court must consider and balance the following factors:

> (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
> (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
> (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.
> (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

Iowa Code § 17A.19(5)(c); *see also Farmers State Bank v. Bernau*, 433 N.W.2d 734, 738 (Iowa 1988).

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[4] Iowa Rule of Appellate Procedure 6.7(3) provides as follows:

> Where the state or any of its political subdivisions appeal a judgment or order, the district court may, upon motion and for good cause shown, stay all proceedings under the order or judgment being appealed without the filing of a supersedeas bond.

In its written ruling, the district court concluded "a stay is appropriate in this case because of the novelty and importance of the legal issue involved coupled with the public interest in preserving the Fund." Upon careful review of the district court's ruling, we conclude the court did not abuse its discretion in granting the stay pending its ruling in the judicial review action. Similarly, we find no abuse of discretion in the district court's grant of a stay without bond, pursuant to rule 6.7(3), pending the outcome of this appeal.

V. Conclusion

We affirm the district court's ruling on judicial review. Accordingly, we remand for a ruling lifting the stay and entry of judgment.

AFFIRMED AND REMANDED WITH DIRECTIONS.