IN THE COURT OF APPEALS OF IOWA

No. 9-947 / 09-0822
Filed December 17, 2009

FRONTIER NATURAL PRODUCTS COOPERATIVE and UNITED HEARTLAND,
Plaintiffs-Appellants,

vs.

BETTY BUTZ,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Appeal from the district court's decision on judicial review that affirmed the agency's award of workers' compensation benefits. **AFFIRMED.**

Thomas D. Wolle of Simmons Perrine Moyer Bergman, P.L.C., Cedar Rapids, for appellants.

Gary Nelson of Rush & Nicholson, P.L.C., Cedar Rapids, for appellee.

Considered by Sackett, C.J., Vaitheswaran and Danilson, JJ.

SACKETT, C.J.

The employer and insurer appeal from the district court's decision on judicial review that affirmed the agency's award of workers' compensation benefits, contending the agency erred in concluding the claimant provided timely notice of her injury. We affirm.

BACKGROUND FACTS AND PROCEEDINGS. The claimant, a former employee of Frontier Natural Food Products, filed an arbitration petition on January 24, 2007, seeking workers' compensation benefits for a left-knee injury in 2005. She identified a traumatic injury from a fall in February of 2005 and a cumulative trauma injury dated in May or June of 2005.[1] The employer denied liability based on the affirmative defense of failure to provide notice within ninety days of the injury. *See* Iowa Code § 85.23 (2007) (denying benefits unless the claimant gives notice or the employer has actual notice within ninety days of injury).

The agency found the claimant did not prove she suffered a work-related injury in February of 2005. It fixed the date of her work-related cumulative trauma injury as June 1, 2005, the date of her first knee surgery. The agency then considered the employer's affirmative defense of lack of notice. It concluded:

> The evidence in this case established that while the [employer] knew that the claimant had been off work for knee surgery and then retired due to her left knee problem, the employer had no information that the claimant was alleging that her knee problem was work related until the petition was filed and served on the

[1] Claimant retired on October 3, 2005. In the comments section of the resignation form, she listed "Health (left knee)."

> employer on January 31, 2007. The claimant conceded that she did not tell anyone at the employer that her knee problem was work related, but for her claim that [the shift lead person] knew about the fall on February 1, 2005.
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> The claimant's obligation to give notice to her employer, however, does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The claimant testified and [her doctor] concurred, that the first discussion between [him] and the claimant concerning the role her employment played in her knee condition was on January 4, 2007. Although the claimant did know that she had a serious left knee condition and did retire as a result of that condition, she did not know of the probable compensable character of that injury until her conversation with [her doctor] on January 4, 2007. It was on January 4, 2007, that the 90 day period for giving notice began to run. Since the petition was filed and served on January 31, 2007, the claimant gave timely notice. The notice defense fails.

On judicial review, the defendants contended the agency misapplied the standards set forth in *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 288 (Iowa 2001), by adding an additional element. In its analysis, the court noted:

> Frontier correctly points out that when Butz retired on October 3, 2005, she informed her employer that her reason for leaving was "health/left knee." It is undisputed that when Butz left the company in October of 2005, she knew her left knee was in such a condition that she would be unable to work in the distribution area. She felt that she needed light duty. She left because she could not get light duty. While these facts might support a finding that Butz knew her injury was serious at the time of her retirement, this does not compel the conclusion that Butz knew or should have known her injury was serious enough to have a permanent adverse impact on her employment at that time.
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> When Butz left the company, she had already been released for work by her doctor without restrictions [after her knee surgery]. She was still seeking treatment from [her doctor] for her pain. In October of 2005, [her doctor] was giving Butz a series of injections in her left knee. It is reasonable to consider whether permanent work restrictions or a permanent physical impairment rating had been given to the employee by her medical provider prior to that date. She had not been given permanent work restrictions nor had she been given a permanent physical impairment rating at that time. Her doctors had not given her an opinion that her work had aggravated her pre-existing condition of degenerative arthritis. In

> fact, it was not until January 4, 2007, that [her doctor] told Butz that standing on concrete for 22 years may have aggravated her degenerative arthritis.
>
> Substantial evidence supports the [agency's] finding that upon her conversation with [her doctor] on January 4, 2007, Butz knew her injury was serious enough to have a permanent adverse impact on her employment or employability. Until this visit, there is no indication in the medical records that Butz was alerted to the seriousness and therefore probable compensable nature of her injury. At that point, Butz knew her condition had a permanent adverse impact on her employment or employability. She was deemed to know the nature, seriousness, and probable compensable character of her injury.

The district court concluded the agency applied the correct standard, it did not add an additional element, and the application of the law to the facts was not irrational, illogical, or wholly unjustifiable. The district court further concluded the agency's findings of fact were supported by substantial evidence.

SCOPE AND STANDARDS OF REVIEW.

> Iowa Code chapter 17A governs the scope of our review in workers' compensation cases. It is well settled that the interpretation of workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the agency. We therefore do not defer to the commissioner's interpretation of the law.
>
> Factual determinations in workers' compensation cases, on the other hand, are clearly vested by a provision of law in the discretion of the agency. Accordingly, we defer to the commissioner's factual determinations if they are based on substantial evidence in the record before the court when that record is viewed as a whole. 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 when the consequences resulting from the establishment of that fact are understood to be serious and of great importance. Thus, when we review factual questions delegated by the legislature to the commissioner, the question before us is not whether the evidence supports different findings than those made by the commissioner, but whether the evidence supports the findings actually made.
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> The application of the law to the facts is also an enterprise vested in the commissioner. Accordingly, we reverse only if the

> commissioner's application was irrational, illogical, or wholly unjustifiable. This standard requires us to allocate some deference to the commissioner's determinations, but less than we give to the agency's findings of fact.

Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 850 (Iowa 2009) (citations and internal quotations omitted).

MERITS. The appellants state their issue as:

> Whether the [agency] erred in holding that claimant, who knew in October 2005 that she had a serious, work-related knee condition that led her to retire, provided timely notice of her injury when she served an arbitration petition on January 31, 2007.

They argue the agency's conclusion that Butz did not know of "the probable compensable character" of her injury until her conversation with her doctor in January of 2007 is erroneous. They contend Butz "knew that she had a work related injury that was serious enough to have a permanent adverse impact on her employment" at least by the time of her retirement in October of 2005.

At the heart of the issue is the agency's application of the discovery rule as set forth in *Herrera*. The appellants believe the agency misinterpreted the law. The supreme court summarized its analysis of the interplay of the "manifestation" of a cumulative injury and the discovery rule on the statutory period for giving notice:

> The preferred analysis is to first determine the date the injury is deemed to have occurred under the *Tasler*[2] test, and then to examine whether the statutory period commenced on that date or whether it commenced upon a later date based upon application of the discovery rule.
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> To summarize, a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this

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[2] *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 829 (Iowa 1992).

> condition or injury was caused by the claimant's employment. 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 at 288 (emphasis added) (quoting *Orr v. Lewis Cent. Sch. Dist.*, 298 N.W.2d 256, 257 (Iowa 1980)).

The appellants contend the agency's application of the "probable compensable character" language from *Herrera* adds an additional factor to the "permanent adverse impact" on employment requirement of knowledge sufficient to satisfy the discovery rule. They argue that "under *Herrera*, once an employee knows her injury is serious enough to have a permanent adverse impact on employment, the employee is also charged with knowledge that the injury is probably compensable." On judicial review, the district court noted that the agency quoted the language from *Herrera*, and concluded it did not add another factor to the analysis.

The supreme court recently considered the application of the discovery rule to the two-year statute of limitations for filing a petition for benefits in Iowa Code section 85.26(1). *See Larson*, 763 N.W.2d at 854-55. Although expressly addressing a different limitation period than the ninety-day notice period before us, the analysis clarifies the application of the discovery-rule language quoted above:

> Consistent with this court's prior decisions, Thorson is entitled to the benefit of the discovery rule, *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 287 (Iowa 2001), and the statute of limitations did not begin to

> run until she recognized, or should have recognized, the "'nature, seriousness, and probable compensable character'" of the disability. *Orr v. Lewis Cent. Sch. Dist.*, 298 N.W.2d 256, 257 (Iowa 1980) (citation omitted); *accord Herrera*, 633 N.W.2d at 287. Thorson's knowledge of *these three triggering factors* may be actual or imputed from the record. *Ranney v. Parawax Co.*, 582 N.W.2d 152, 154-55 (Iowa 1998).

Id. at 854 (emphasis added). The phrase "probable compensable character" is *not* synonymous with an employee's recognition of the "seriousness" of the injury as the appellants claim. The appellants' argument that the agency erred in adding an additional factor to the analysis is without merit. The agency correctly understood the law to require knowledge of all three "triggering factors." *See id.*

Having determined the agency did not misunderstand the law, we consider, then, whether the agency's finding that Butz did not know of the probable compensable character of her knee condition until her discussion with her doctor in January of 2007 is supported by substantial evidence. The appellants contend, when the record is viewed as a whole, that it is not.

As is often the case when parties dispute the findings made by the agency, there is evidence in the record when viewed as a whole that does not support the agency's findings. The district court recognized the existence of contrary evidence in this case, but properly focused its consideration on whether the evidence supports the decision made, not whether it supports a different decision. "[T]he question before us is not whether the evidence supports different findings than those made by the [agency], but whether the evidence supports the findings actually made." *Larson Mfg.*, 763 N.W.2d at 850 (citation omitted). We broadly and liberally construe an agency's findings to uphold, rather than defeat the decision. *Second Injury Fund v. George*, 737 N.W.2d 141,

154 (Iowa 2007). "Evidence should not be considered 'insubstantial merely because the court may draw different conclusions from the record.'" *Id.* (citation omitted). "[I]n challenging an agency finding, a party may not succeed merely by showing that the evidence would support a different conclusion than the one that the agency reached." *Garcia v. Naylor Concrete Co.*, 650 N.W.2d 87, 91 (Iowa 2002) (citation omitted). "In order to succeed, it must be demonstrated that, as a matter of law, the finding that the agency made was not supported by substantial evidence." *Id.*

Claimant had knee surgery for knee problems in June of 2005. She returned to work in September without any restrictions and with no impairment rating as a result of her knee problems. She was unable to continue working in her position in the warehouse without pain, so she tried to find suitable light-duty work with her employer. Failing that, she retired, citing "health (left knee)." She was a sixty-two year old woman with only a high school education who had worked for the same employer for twenty-two years. None of her doctors had told her that the kind of work she did, involving walking and standing on concrete all day, could aggravate her pre-existing, mostly asymptomatic degenerative arthritis—until she met with her doctor on January 4, 2007. The agency found she did not know of the probable compensatory character of her knee condition until that visit to her doctor. The district court, considering the evidence, found substantial evidence supported the agency's finding. We conclude the appellants have not demonstrated, as a matter of law, that the agency's finding was not supported by substantial evidence. *See id.*

Applying the law to the facts of this case, the agency determined the defendants had not proved their affirmative defense of lack of timely notice. The district court determined the agency's action was not irrational, illogical, or wholly unjustifiable. *See* Iowa Code § 17A.19(10)(*l*), (m); *see also Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004). From our review of the record before us, our conclusions are the same as those of the district court. *See Kohlhaas v. Hog Slat, Inc.*, ___ N.W.2d ___, ___ (Iowa 2009). Therefore, we affirm.

AFFIRMED.