

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY**MICHAEL HECHT,****Petitioner,****v.****HIGHLINE CONSTRUCTION,****Respondent.****05771 CVCV055830****JUDICIAL REVIEW DECISION**

This matter came before the Court for hearing on September 7, 2018, seeking judicial review of a final agency order from the Workers' Compensation Commission.

I. Findings of Fact and Procedural Background.

Claimant/Petitioner Michael Hecht (Hecht) was working as a mechanic for Highline Construction (Highline) on August 13, 2014 when an air brake system on a truck sent compressed air toward the right side of Hecht's head, including his right ear. Highline accepted the injury as a work injury and provided treatment. Hecht was first seen in the Allen Hospital ER in Waterloo. He was released to return to work on August 15, 2014. He was referred to ENT Dr. Hart, who referred him to Dr. Hansen at the University of Iowa Hospitals. Hecht was treated by Dr. Hansen, who noted his ear structure was normal and tympanic membrane intact. Hecht also treated with Dr. McCains at Allen Occupational Health. Three audiograms done over a two-month time period were not consistent and the last one had worsened. Dr. McCains recommended one more evaluation with Dr. Hansen at University of Iowa. Dr. McCains provided a 10% impairment rating.

Hecht refused to see Dr. Hansen and Highline suspended benefits. After Highline asserted the right to examination, Hecht agreed to attend the exam with Dr. Hansen. Dr. Hansen placed Hecht at MMI and provided the opinion that "objective measures reveal normal hearing in

the right ear” and that “Hecht did not suffer any permanent hearing loss as a result of the work incident on 8/13/2014.” Dr. Hansen did note that “it is difficult to state within a reasonable degree of certainty as to whether or not Mr. Hecht suffers from tinnitus or the extent to which it is disruptive of his activities of daily living.” Dr. Hansen found there was no permanent impairment and no permanent restrictions. In a follow up report, Dr. Hansen noted that the inconsistent subjective tests raised the suspicion that the patient was not providing accurate responses and that is seen when patients exaggerate hearing loss.

Hecht was then evaluated by Dr. Tyler, an audiologist, at the request of Hecht’s attorney. Dr. Tyler found a 4% bilateral hearing impairment and 22% whole body impairment as a result of tinnitus and provided work restrictions. Dr. McMains reviewed Dr. Hansen and Dr. Tyler’s records and changed his opinion regarding permanency to a 0% whole person impairment. He stated that Dr. Tyler’s theories “do not appear to conform to standard peer reviewed literature.” Hecht then saw Dr. Bansal, at the request of his attorney, and Dr. Bansal provided a 17% binaural hearing loss and agreed with Dr. Tyler’s 22% whole person impairment rating for tinnitus.

In the workers’ compensation proceedings, the Parties stipulated: 1) that Hecht received an injury arising out of and in the course of employment with Highline, 2) that Hecht was not seeking any additional temporary or healing period benefits, and 3) that medical benefits were not in dispute. Highline voluntarily paid 20 weeks of permanent disability benefits and then stopped paying benefits when Hecht refused to go to an additional appointment with Dr. Hansen.

Three issues were submitted to the Deputy Commissioner at the Arbitration Hearing: 1) the extent of Hecht’s entitlement to weekly permanent disability benefits and the rate of weekly compensation for such benefits; 2) the extent of Hecht’s entitlement to reimbursement for the

independent medical evaluation by Sunil Bansal, M.D., and 3) the extent of Hecht's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits.

The Arbitration Decision awarded Hecht permanent partial disability benefits based on a finding of a 30% industrial disability, set a weekly compensation rate, awarded the cost of Dr. Bansal's IME, and assessed penalty benefits based on a delay in paying permanent partial disability benefits. Highline appealed the decision. After filing the notice of appeal, Highline filed an application to submit newly discovered evidence. Hecht resisted the motion. Deputy Commissioner Christenson granted the application and allowed three additional exhibits into the record: Exhibits O, P, and Q. Although Hecht opposed the application to submit newly discovered evidence, he did not ask to submit his own additional evidence in response to Exhibits O, P, and Q, attempt to explain the documents, or request a hearing at that time. (See 08/25/2016 Response to Defendant's Application to Submit Additional Evidence). Hecht did assert that he had additional arguments regarding lack of diligence in discovering the evidence and relevance but did not make those arguments.

On appeal, on January 25, 2018, Commissioner Cortese reversed the finding of industrial disability and, therefore, awarded no permanent partial disability benefits. The Appeal Decision also reversed the award of penalty benefits, since it was based on delayed PPD benefits, which the Appeal Decision held Hecht was not entitled to. The Appeal Decision affirmed the award of the cost of Dr. Bansal's IME to Hecht and the weekly compensation rate. The Appeal Decision relied, in large part, on the additional exhibits O, P, and Q that had been submitted after the hearing.

Exhibits O, P, and Q relate to Hecht's subsequent employment after Highline. Hecht quit his job with Highline two months after the work injury, but admitted he did not leave because

of the injury. Hecht testified at the Workers' Compensation arbitration hearing that he then took a job with Telcom Construction but had to quit that job because he ran a car off the road while on a repair job and felt it was not safe for him to drive a commercial vehicle because of alleged hearing loss. He testified he was not terminated but that he resigned. Exhibits O, P, and Q contradict Hecht's testimony at the Workers' Compensation hearing. Exhibit O indicated that Hecht was terminated from Telcom for performance related issues. Exhibit P contained unemployment records in which Hecht claimed he quit Telcom for a different reason: that he was being asked to conduct illegal DOT inspections. Exhibit P also contained testimony by Hecht that he was employed by Baker Concrete and Excavating as a mechanic but quit because he wanted to be out in the field more. Hecht had not mentioned the job with Baker during the Workers' Compensation hearing. The Commissioner relied on the discrepancy between Exhibits O, P, and Q and Hecht's testimony to find him not credible and reverse the Deputy Commissioner's award of 30 percent industrial disability permanency benefits.

Hecht filed a Motion for Rehearing, seeking a remand hearing to allow Hecht an opportunity to explain Exhibits O, P, and Q. Commissioner Cortese denied the motion, noting that Hecht had failed to supplement his discovery to provide information that his employment with Telecom had ended or about subsequent employment. The Ruling noted that Hecht could have explained the information in Exhibits O, P, and Q but instead gave contradictory testimony. Further, the Ruling noted that Hecht had not made a showing of any newly discovered evidence he wanted to submit at a remand hearing that could explain Exhibits O, P, and Q.

Hecht filed a petition for judicial review, raising three issues. First, Hecht argues the commission did not have authority to consider the additional exhibits because the request was filed on day 21 and the relevant administrative rule requires additional evidence to be submitted

within 20 days of filing a notice of appeal. Second, Hecht argues that even if the commission had authority to extend the deadline, the commission erred in holding there was good cause to extend the deadline. Third, Hecht argues he should have been entitled to a hearing and a chance to rebut or respond to the three additional exhibits.

II. Standard of Review.

The standards set forth in Iowa Code chapter 17A govern judicial review of final decisions by the workers' compensation commissioner. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 768 (Iowa 2016), reh'g denied (May 27, 2016). Iowa Code section 17A.19(10) provides specific grounds for challenges to agency decisions. Hecht raises two grounds for reversal. First, Hecht argues the agency acted in an erroneous interpretation of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency. Iowa Code §17A.19(10)(c). Second, Hecht argues the agency acted in a manner that is unreasonable, arbitrary, capricious, or an abuse of discretion. Iowa Code §17A.19(10)(n).

III. The Deadline for Submission of Additional Evidence.

Hecht argues the Commissioner did not have authority to consider the additional evidence because the motion to submit additional evidence was filed one day late. The relevant workers' compensation administrative rule provides:

The commissioner shall decide an appeal upon the record submitted to the deputy workers' compensation commissioner unless the commissioner is satisfied that there exists additional material evidence, newly discovered which could not with reasonable diligence be discovered and produced at the hearing. A request for the taking of additional evidence must be filed with the workers' compensation commissioner within twenty (20) days of the filing of the appeal. Any briefs required or allowed by this rule shall be filed promptly following service.

IAC 876-4.28.

Hecht contends the Commissioner did not have authority to accept a filing on day twenty-one because the rule states a request for the taking of additional evidence "must" be filed within

twenty days. This court finds that the Commissioner had authority to accept the late submission. A workers' compensation administrative rule allows the Commissioner to modify deadlines for good cause: "For good cause the workers' compensation commissioner or the commissioner's designee may modify the time to comply with any rule." IAC 876-2.1. Therefore, the twenty day deadlines in rule 876-4.28 may be modified for good cause. Hecht has not pointed to any contrary rule that would require IAC 876-4.28 to be interpreted as a jurisdictional deadline that cannot be extended.

Further, the Parties agree that Iowa's rules of civil and appellate procedure apply to the extent there is not a specific workers' compensation rule on point. Iowa Rule of Appellate Procedure 6.1003 sets forth which deadlines are jurisdictional and which are not. Other than the deadlines listed in 6.1003(1)(a-e), the Court may shorten or extend a non-jurisdictional deadline for good cause. While IAC 876-2.1 controls, even if the Iowa Rules of Appellate Procedure were applied, they would also apply a good cause standard.

IV. The Good Cause Standard and Decision to Admit Additional Evidence.

Hecht next argues that there was not good cause to extend the deadline to submit additional evidence and that the additional evidence should not have been admitted. Hecht is seeking a reconsideration of the merits after exclusion of Exhibits O, P, and Q.

The Commissioner's decision regarding additional evidence is reviewed for an abuse of discretion. See Shultz v. Gary Boveia Law Firm, 695 N.W.2d 43 (Iowa Ct. App. 2004) ("We will not overturn the commissioner's decision to refuse additional evidence unless there was an abuse of discretion.") (citing Temple v. Vermeer Mfg. Co., 285 N.W.2d 157, 160 (Iowa 1979)). Hecht must show that the Commissioner "exercised its discretion on untenable grounds or its exercise of discretion was clearly erroneous." Id.

The Commissioner made a ruling that highline had shown good cause for filing the application one day late:

Defendants admit the application as one day late. This delay was caused, in part, on death of defendant's counsel mother, and a change in office staff. Given this record, defendants have shown good cause for requesting an extension of time to file an application under Rule 876 IAC 4.28, under 876 IAC 2.1.

(September 7, 2016 Ruling). Hecht argues that mis-docketing or a change in office staff are always insufficient to raise to the level of good cause. However, Highline's filing explained that defense counsel had been out of the office for a significant amount of time due to her mother's illness and death and another family member's diagnosis with brain cancer. When the time out of the office was combined with a change in office staff, it resulted in the mis-docketing of the deadline. The Commissioner specifically considered the good cause standard and did not abuse his discretion in finding this justification to be sufficient good cause. Death of a close family member falls squarely within good cause. See e.g. State v. Reifensahl, 739 N.W.2d 503 (Iowa Ct. App. 2007) (affirming delay of trial by 10 days based on good cause, despite defendant's speedy trial right, due to death of witness's sister).

The Commissioner also ruled that the additional evidence would be admitted. The Commissioner determined that the standard of "material evidence, newly discovered, which could not with reasonable diligence be discovered and produced at the hearing" under 876 IAC 4.28 had been met. The Commissioner explained that Hecht failed to supplement discovery information regarding his employment, including that he had quit working at Telcom or that he had worked for Baker. Therefore, the Commissioner held that the reason the evidence was newly discovered and could not have been produced was "in large part due to claimant." (09/07/2016 Ruling). This ruling was not an abuse of discretion. Highline had no reason to seek records regarding Hecht's termination from Telcom, unemployment benefits, or work at Baker because

Highline had not received any discovery supplement indicating that Hecht was no longer working for Telcom.

V. Entitlement to a Hearing.

The Workers' Compensation Commissioner applied the standard found in the agency rules for determination of whether additional evidence would be submitted. Hecht was provided notice of Highline's motion to submit additional evidence, an opportunity to resist that motion, and did file a resistance to that motion.

Hecht argues that after the Commissioner relied on Exhibits O, P, and Q in reaching the Appeal Decision, it should have allowed him a re-hearing so that he could explain Exhibits O, P, and Q. In oral argument before this Court, Hecht's counsel raised hypothetical possibilities such as the possibility that Exhibits O, P, and Q were about someone other than Hecht. However, Hecht had the opportunity to oppose the admission of Exhibits O, P, and Q into the record and could have asserted at that time that they are not authentic records that relate to him. Hecht never made such assertion. Hecht has never identified any material response to Exhibits O, P, and Q. He had the opportunity to make a material response in opposition to Highline's motion.

In addition, Hecht could have, but did not, seek a hearing at the time the Deputy Commissioner was deciding whether to allow the additional evidence. If Hecht felt there was some explanation to these documents—other than that he had been caught giving incorrect testimony—Hecht had the chance to raise that issue with the Commissioner. Even after the September 7, 2016 Ruling allowing Exhibits O, P, and Q, Hecht did not seek a hearing. It was only after the January 25, 2018 final agency ruling (Appeal Decision), which relied on the substance of Exhibits O, P, and Q, that Hecht raised his request for a re-hearing.

This Court will not address whether, had Hecht asked for a hearing at the time Exhibits O, P, and Q were offered by Highline, whether the Workers' Compensation Commission would have been required to allow him the chance to explain the additional exhibits in a hearing. Hecht had the chance to resist the application to submit additional evidence, he did so, and he did not request a hearing.

This case is not comparable to In re A.B., 860 N.W.2d 925 (Iowa Ct. App. 2014). In that matter, the Iowa Court of Appeals reversed a District Court ruling terminating a mother's parental rights and remanded for a hearing to allow the mother to present additional evidence where the District Court had relied on information provided by a guardian ad litem after the termination hearing closed. In In re A.B., the mother did not have notice the juvenile court would consider the GAL report in the termination matter, did not have the opportunity to respond, and, in fact, the District Court did not reopen the record or actually admit the new evidence into the record. Id. Here, Hecht had notice of the additional evidence, there was a formal motion made to admit it into the record, and Hecht had the opportunity to resist the admission of the additional evidence. Hecht could have identified any flaws in the Exhibits in his resistance or requested a hearing so that he could respond to the substance of the exhibits. Unlike the mother in In re A.B., Hecht had notice and the opportunity to respond.

IT IS HEREBY ORDERED that the Workers' Compensation Commission final agency decision is affirmed. Costs are assessed to the Petitioner/Claimant.



State of Iowa Courts

Type: OTHER ORDER

Case Number **Case Title**
CVCV055830 MICHAEL HECHT VS HIGHLINE CONSTRUCTION INC

So Ordered

A handwritten signature in cursive script, appearing to read 'Sarah Crane', is written over a horizontal line.

Sarah Crane, District Court Judge
Fifth Judicial District of Iowa