BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GARY L. LOUVAR,

Claimant,

vs.

CITY OF CEDAR RAPIDS,

Employer,
Self-Insured,
Defendants.

File Nos. 5048373
5052473
5055075
5055076

RULING ON

MOTION FOR REHEARING

On April 9, 2018, I filed an Arbitration Decision, which denied benefits to the claimant. I found that the claimant's mental injury claims were preempted as they were based upon all of the same conduct in his civil rights claims.

On April 19, 2018, claimant filed an Application for Rehearing (Application), requesting expanded findings of facts and conclusions of law. I interpret the claimant's request to encompass two broad assertions in his 16 page Application. The claimant contends that the undersigned failed to consider important facts in the record of evidence. The claimant contends that the undersigned misapplied the law, citing a number of common law cases on preemption, many of which were not cited in his original brief.

The City has resisted. Claimant promptly filed a reply to the resistance.

Factual Findings

Claimant has broadly alleged that certain important factual findings have been omitted from the Arbitration Decision, including the failure to identify Tim Fowler as a witness and the failure to identify two written complaints against claimant's supervisor. Claimant further contends that despite "the extensive evidence comprising this record no evidence establishes the reason, motive, or any association of the actions of defendants toward the claimant as being based upon or due to" any of the protected classifications set forth in the Iowa Civil Rights Act or comparable federal civil rights laws. (Claimant's Application for Rehearing and Reconsideration, page 2, filed April 19, 2018).

I agree with the claimant that the record is voluminous. Much of the evidence submitted by the claimant was background evidence involving acts and allegations which occurred long before the allegations set forth in claimant's petitions. Much of this evidence was presented to demonstrate that claimant was subjected to mistreatment or harassment over a long period of time. This evidence, in part, helps explain why the claimant suffered such severe emotional distress regarding the events set forth in his petitions. While this evidence is technically relevant, it is not as important as the evidence surrounding the current events outlined in his petitions. Those are the

claimant's actual claims regarding when and how he suffered a mental-mental work injury. Claimant's counsel, who zealously advocated for his client, did not make a distinction between the current actions which were truly the subject of his immediate work injury claims as compared to older, less probative accusations of past disparate treatment. This is a significant reason for the voluminous nature of the record before the agency.

Nonetheless, to the extent it has been questioned, all of the testimony from every witness, every sworn statement and every piece of evidence submitted by both parties was reviewed in detail and in context. The most crucial pieces of testimony and evidence submitted, particularly those dealing with the specific allegations of work injuries, were analyzed in detail in the findings of fact.

To be clear, I listened to Mr. Fowler testify live, as I did with all of the witnesses, and I re-read his testimony set forth in Transcript Volume III, pages 560 to 602, before writing the decision. While I found Mr. Fowler's testimony to be quite credible, it primarily dealt with much older allegations of disparate treatment.[1] Much of Mr. Fowler's testimony did not even specify a timeframe for the occurrence of the actions discussed, but a significant majority of it seemed to deal with much older, less relevant matters. For example, a full six pages of his transcript testimony is spent discussing a PowerPoint presentation where claimant's supervisor allegedly denigrated claimant in front of a group of golf sales associates. (Tr., pp. 568-73) This testimony did directly contradict Lisa Miller's testimony on this topic. (Tr., pp. 472-75) To this extent, it is credibility evidence. None of this testimony, however, had significant relevance for dealing with the issue of whether Mr. Louvar's workers' compensation claims are preempted by the ICRA. Frankly, based upon the evidence submitted, I am not entirely certain when that PowerPoint presentation to sales associates even occurred or even whether it was particularly significant to the claimant's development of emotional distress.

At hearing, the claimant presented vast amounts of testimony and evidence similar to this. Again, while it was undoubtedly technically relevant, I did not find it necessary to discuss each accusation in the findings of fact, particularly the incidents which appeared much older.

The claimant also suggested I did not consider the complaints of discrimination he made. I specifically addressed his complaints in the findings of fact. (Arbitration Decision, pp. 3-5)

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[1] Mr. Fowler is an upstanding member of the Cedar Rapids community, a former teacher and school administrator. He was well-spoken and his testimony was believable. There was nothing about his demeanor which caused me concern about his truthfulness. He was a neutral witness in the sense that he is not close friends with the claimant, but rather a colleague who genuinely believed Mr. Louvar was being treated differently from other similarly-situated golf pros. Most of his first-hand knowledge of the events which transpired, involved older, less probative allegations.

For these reasons, I find there is no reason to amend the statement of the case or the findings of fact. It is and should be noted that Mr. Fowler did testify as a rebuttal witness, under oath on the claimant's behalf.

Conclusions of Law

In his Application for Rehearing, claimant presents a number of common law cases which generally address the issue of preemption outside of the context of workers' compensation. (See Cl. Application for Rehearing, pp. 5-7) The cases include Grahek v. Voluntary Hosp. Co-Op, 473 N.W.2d 31 (Iowa 1991); Greenland v. Fairtron Corp., 500 N.W.2d 36 (Iowa 1993); and Channon v. United Parcel Service, Inc., 629 N.W.2d 835 (Iowa 2001). The claimant argues that the test set forth in this series of Iowa Supreme Court cases supports his position. These are all cases involving whether common law legal theories are preempted under the Iowa Civil Rights Act. None of these cases were cited and argued in the original or supplemental briefing before the undersigned in this case.

In his Application, the claimant presents some reasonably solid legal arguments about why the preemption test in workers' compensation cases, as set forth in Ottumwa Housing Auth. v. State Farm Fire, 495 N.W.2d 723, 729 (Iowa 1993); Baird v. Ottumwa Community Sch. Dist., 551 N.W.2d 874 (Iowa 1996); Cargill, Inc. v. Conley, 620 N.W.2d 496 (Iowa 2000), is flawed. In my analysis, even with these cases now presented, I conclude none of this changes the legal test which this agency has been directed to follow; that is, whether the claims set forth in the injured worker's work injury claims are based upon the same acts or circumstances as the claims in his civil rights claim. The claimant is really arguing that the legal test for preemption should be changed to more closely follow the common law cases. I do not have authority to overrule existing Iowa Supreme Court precedent.

Finally, I note that in his Application, claimant's counsel has repeatedly focused upon the fact the determination should be based upon what is in the claimant's pleadings, rather than what is in the record of evidence as a whole. The suggestion is that I should not have considered the entire record of evidence in making my conclusions, but rather, I should have focused solely upon the pleadings. For example, when describing the Iowa Supreme Court's ruling in Channon, claimant argues the following:

> 14. The Supreme Court reiterated that the test for determination of whether Iowa Code chapter 216 provides the exclusive remedy for preemption is: '. . . whether *in light of the pleadings*, discrimination is made an *element* of the non-IRCA claims. . . . Therefore the key is [Channon's] characterization of her emotional distress claim *as stated in her pleadings*.' . . .

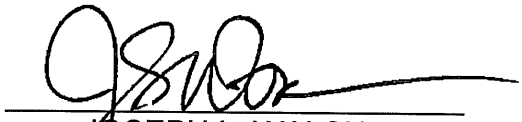
(Cl. Application for Rehearing, pp. 7-8) Claimant's counsel thereby suggests that it was improper for this agency to consider the entire record when making the determination.

I disagree. The reason that the focus was on the pleadings in Channon, is because it was decided on summary judgment. Some of the plaintiff's counts were dismissed before trial as being preempted. In other words, the Iowa Supreme Court was reviewing the district court's summary judgment ruling. Channon, 629 N.W.2d at 846. In fact, virtually all of the cited preemption cases, both in the underlying briefs and in the Application for Rehearing, were decided in some type of prehearing motion, not following a hearing or trial on the merits. In this case, the parties proceeded to a full hearing and a full record was developed thereby giving the claimant a greater opportunity to raise distinctions between his civil rights and work injury claims. I considered the full record of evidence and, even after reviewing the additional cases cited by claimant's counsel, I believe this was correct.

Having developed a full record of evidence, I conclude that, in this case, the acts and circumstances between Mr. Louvar's claims are the same. Nothing in claimant's Application has convinced me otherwise.

Claimant's Application for Rehearing is Denied.

Signed and filed this 2nd day of May, 2018.



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JLW/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.