IN THE COURT OF APPEALS OF IOWA

No. 0-063 / 09-0809
Filed March 10, 2010

MAGNA INTERNATIONAL OF AMERICA, INC., d/b/a WILLIAMSBURG MANUFACTURING and ZURICH INSURANCE,
Petitioners-Appellants,

vs.

GEORGANNA HILL,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

Employer and insurance carrier appeal from a district court judicial review ruling affirming the workers' compensation commissioner's benefit award. **AFFIRMED.**

Dorothy L. Kelley, Des Moines, for appellants.

Martin Ozga of Neifert, Byrne & Ozga, P.C., West Des Moines, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

EISENHAUER, J.

Magna International of America, Inc. and Zurich Insurance (Magna) appeal from the district court's ruling affirming the Iowa Workers' Compensation Commissioner's decision awarding Georganna Hill permanent total disability benefits. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

In January 2003, Hill started work as a welder for Magna. Hill's pre-employment physical determined she could work without restrictions. Hill's welding job required her to lift thirty pounds and to make repetitive use of her hands, arms, and shoulders.

On May 26, 2006, after Hill experienced continuing pain in her right hand, wrist, elbow, and shoulder, Magna sent her to Dr. Cuddihy. Dr. Cuddihy diagnosed wrist and elbow nerve irritation, tendinitis, and lateral epicondylitis. Dr. Cuddihy prescribed medication and ordered two weeks of physical therapy. Hill was restricted to light-duty work with a five pound lift/push/pull limit for her right arm. At Hill's June 7 follow-up appointment, Dr. Cuddihy continued physical therapy, increased the weight restriction to ten pounds, and ordered no repetitive right arm usage. Hill continued to experience problems while on light-duty work, including problems on her left side, and on June 30, she was taken off work by Dr. Cuddihy and told to continue physical therapy.

On July 6, Hill saw Dr. Dove, on referral from Dr. Cuddihy, for a neurological evaluation. Dr. Dove opined Hill had mild carpal tunnel syndrome and epicondylitis.

Five days later, on July 11, Dr. Cuddihy diagnosed Hill with fibromyalgia and opined her fibromyalgia was not work-related or materially aggravated by her work. He referred Hill to her family doctor. This was the last time Hill saw Dr. Cuddihy for treatment, although he did see her later for an assessment. Dr. Cuddihy ordered prophylactic restrictions of a five pound lift/push/pull limit, no repetitive use of upper extremities, and no repetitive gripping/grasping with her hands. Magna told Hill it had no light-duty work for her and suggested she apply for short-term disability, which she received.

On July 24, Hill's family doctor, Dr. Bruxvoort opined Hill "was tender over five of the eighteen trigger points for fibromyalgia, which does not constitute fibromyalgia." Dr. Bruxvoort concluded "it does appear as these [symptoms] may be more work-related than her Occupational Health is giving credit for."

On July 31, Dr. Bruxvoort's examination revealed Hill had tenderness in the trapezius muscles, and opined since "those are the only areas that she is tender . . . she does not have enough of the trigger points to constitute a diagnosis of fibromyalgia." Additionally:

> I have reviewed the previous occupational health progress notes and the diagnosis of fibromyalgia came from 10-13 sore areas on her body. However, the sore areas do not coincide with the usual trigger point areas of pain with fibromyalgia except for 5-6 out [of] the typical areas of pain. I have requested a possible second opinion that this could still be overuse and work-related, requiring more physical therapy, or possibly steroid injections into the areas of pain . . . .

On August 7, 2006, Dr. Bruxvoort referred Hill to Dr. Stoken, a pain specialist, stating:

> I recently got involved when occupational health finally diagnosed her with fibromyalgia. Looking at their diagnosis and what are the trigger points for fibromyalgia, it appears as though she only has about 5-6 of the 18 necessary for fibromyalgia, so I am hesitant to give her a diagnosis of fibromyalgia because most of her areas of pain appear to be more of a tendonitis . . . . I have requested a second opinion from occupational health . . . and they have declined at this time.

On August 22, Dr. Stoken opined Hill had repetitive stress syndrome of the bilateral upper extremities including epicondylitis, shoulder bursitis, and forearm myofascial tendonitis. Additionally, Dr. Stoken diagnosed carpal tunnel syndrome (right) and chronic bilateral upper extremity pain. Treatment included four weeks of physical therapy as well as a home exercise program.

Also in August, Dr. Bruxvoort ordered a MRI for Hill. Dr. Murphy, the radiologist, reported a disc herniation with mild displacement of the cord at the C3-C4 level and a small free-fragment at C-2.

In September 2006, Dr. Bruxvoort referred Hill to Dr. Boarini, a neurosurgeon. Dr. Boarini reviewed the MRI and concluded Hill had insignificant mild degenerative bulges, but "nothing of significance and nothing that lateralizes." Dr. Boarini concluded Hill was not a surgical candidate. Also in September 2006, Dr. Stoken referred Hill for a cervical injection. On October 3, Dr. Iqbal gave Hill an epidural steroid injection, with follow-up by Dr. Stoken.

During October 2006, Dr. Stoken returned Hill to work for four hours daily with restrictions of avoiding repetitive work while allowing occasional lifting of ten pounds. On October 31, Dr. Stoken increased Hill's restricted work week to six hours daily, followed by eight hours the next week.

Dr. Stoken took Hill off work on November 7, 2006, stating: "She is unable to tolerate the repetitive nature of her current job." On November 28, Dr. Stoken diagnosed repetitive stress syndrome of the bilateral upper extremities, including bilateral epicondylitis. Additionally, Dr. Stoken noted chronic neck pain with cervical disc herniation at C3-C4. Dr. Stoken opined Hill did not have fibromyalgia and stated her injuries were causally related to her work at Magna:

> These are related to her work due to the excessive repetitive tasks and motions that she has to do throughout the whole day. I recently sent her back to work and her symptoms became worse, even though she was on restricted duty and restricted hours.

In December 2006, Hill began receiving long-term disability benefits through Magna after her short-term disability benefits expired. In January 2007, Magna terminated Hill's employment stating: "At this point in time it is clear that you are unable to perform the essential duties of any job associated with our business."

In March 2007, Hill was evaluated by Dr. Mineart in connection with her application for social security disability. Dr Mineart tested for fibromyalgia and did not diagnose fibromyalgia, rather, "chronic pain in upper extremities, uncertain etiology." He opined Hill was not able to perform repetitive work with her hands. Hill's initial social security disability application was denied.

On July 27, 2007, Hill was again examined by Dr. Cuddihy at Magna's request. Dr. Cuddihy stated Hill "no longer fits strict criteria for fibromyalgia due to lack of tender points." However, he opined: "Her symptoms and history and clinical findings are much more consistent with a rheumatologic condition such as fibromyalgia or fibromyalgia-like syndromes . . . ."

Dr. Cuddihy requested Hill undertake a functional capacity evaluation in August 2007. After reviewing the results, Dr. Cuddihy determined Hill's pain complaints were global in nature and again adopted prophylactic restrictions, stating the restrictions were not due to any illness/injury related to employment.

Also in August 2007, Hill had an independent medical evaluation with Dr. Stoken, who diagnosed repetitive stress syndrome and a herniated disc at C3-C4 with chronic cervical pain. Dr. Stoken proposed permanent restrictions and again connected the conditions with Hill's employment, finding a thirteen percent impairment of the whole person.

At the October 2007 workers' compensation hearing, Magna argued Hill did not sustain an injury arising out of her employment. Noting "the question of causation is essentially within the domain of expert testimony," the deputy analyzed the medical testimony:

> Dr. Cuddihy's diagnosis of fibromyalgia is disputed by Dr. Stoken and Dr. Bruxvoort. Dr. Stoken explains [Hill's] pain was regionalized to a consistent pattern in the neck, shoulders and arms, which is consistent with the repetitive motion [Hill] engaged in at her job. Further, Dr. Bruxvoort indicated based upon his examination thirteen days after Dr. Cuddihy diagnosed fibromyalgia that [Hill] was only tender over five of the eighteen trigger points for fibromyalgia. Moreover, he noted that he had reviewed the occupational health progress notes and found the diagnosis came from ten-thirteen sore areas of [Hill's] body but that with five or six exceptions, those sore areas did not coincide with the usual trigger points of fibromyalgia.
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> Dr. Boarini's opinion that [Hill] did not have a herniated disc is inconsistent with the radiologist's report prepared after the MRI.
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> When [Hill] began this job she was able to perform without restrictions or accommodations. She continued to do so for three years before her condition developed. Dr. Cuddihy proposes "prophylactic" restrictions which he indicates are not related to the job. However, it is apparent that the restrictions are required to prevent aggravation of [Hill's] condition; otherwise the restrictions

> would be unnecessary. Dr. Cuddihy only treated [Hill] for a period of seven weeks.
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> Dr. Stoken's and Dr. Bruxvoort's opinions are consistent with [Hill's] job duties which placed maximum demand requirements of frequent repetition for more than three hours per day as well as [Hill's] complaints. The opinions of Dr. Stoken and Dr. Bruxvoort are given greater weight than that of Dr. Cuddihy. [Hill] now has permanent restrictions and permanent impairment as result of the work injury which is indication of permanent disability. [Hill] has established that she has sustained permanent disability as result of her work injury.

Next, the deputy determined the extent of Hill's entitlement to a permanent disability. Hill, age fifty-two, did not have either a high school diploma or a GED and her prior employment consisted primarily of welding. The deputy concluded Hill is permanently and totally disabled, stating:

> As a result of the work injury [Hill] has substantial permanent restrictions that prevent her from returning to any of the work she has performed in the past. [Hill] has no transferable skills for sedentary work and is not a good candidate for retraining based upon her limited education. [Hill] experiences chronic pain with even the simplest of tasks.

On appeal the industrial commissioner adopted the deputy's decision as final agency action. The district court affirmed the agency action and this appeal followed.

II. SCOPE AND STANDARDS OF REVIEW.

Iowa Code section 17A.19 (2009) lists the instances when a court may, on judicial review, reverse, modify, or grant other appropriate relief from agency action. Magna's argument the agency's award "deserves close scrutiny" is without merit. Recently, the Iowa Supreme Court reaffirmed appellate courts do not apply a "scrutinizing analysis" to the commissioner's findings. *Midwest Ambulance Serv. v. Ruud,* 754 N.W.2d 860, 866 (Iowa 2008). Rather, we are

bound by the agency's findings of fact if supported in the record as a whole and will reverse only if we determine substantial evidence does not support the agency's findings.[1] *Id*. at 864.

Unlike the commissioner's findings of fact, "we give the commissioner's interpretation of the law no deference and are free to substitute our own judgment." *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007). "On the other hand, application of the workers' compensation law to the facts as found by the commissioner is clearly vested in the commissioner" and may be reversed "only if it is irrational, illogical, or wholly unjustifiable." *Id*.

III. CAUSATION.

Magna concedes there is "some evidence" to support the conclusions of the agency, but argues there is not "substantial evidence" supporting the agency's finding Hill sustained an injury arising out of her employment. Magna claims the agency erroneously credited Drs. Bruxvoort, Stoken, and Murphy over the reports of Drs. Cuddihy and Boarini.

"An injury 'arises 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, 649 (Iowa 2000). Whether Hill's injury has a causal connection with her employment or arose independently "is ordinarily established by expert testimony and the weight to be given such an opinion is for the finder of fact." *Id*.; *see also*

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[1] Magna claims the principles relating to expert opinion evidence outlined in *Leaf v. Goodyear Tire & Rubber Co*., 590 N.W.2d 525 (Iowa 1999) should be "applicable in a workers' compensation case through the substantial evidence review." Magna did not raise this claim in the district court. We do not consider issues raised for the first time on appeal. *Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002).

Titan Tire Corp. v. Employment Appeal Bd., 641 N.W.2d 752, 755 (Iowa 2002) (holding weight of evidence exclusively within the agency's domain). Further, any expert opinion, "even if uncontroverted, may be accepted or rejected in whole or in part" by the agency. *Frye v. Smith-Doyle Contractors*, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

It is not the role of the district court on judicial review, or this court on appeal, to reassess the weight and credibility of expert opinion evidence. *See Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-95 (Iowa 2007). "The reviewing court only determines whether substantial evidence supports a finding 'according to those witnesses whom the [commissioner] believed.'" *Id*. at 395 (emphasis omitted). Further, after the industrial commissioner weighs the evidence, this court "should broadly and liberally apply those findings in order to uphold, rather than defeat, the industrial commissioner's decision." *Gray*, 604 N.W.2d at 649.

Noting the agency "gave a thorough explanation as to why the opinions of Dr. Stoken and Dr. Bruxvoort were given greater weight," the district court ruled substantial evidence supported the agency's "factual determination [Hill] sustained an injury which arose out of her employment with [Magna]." When we review 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. If they are the same, we affirm; otherwise, we reverse." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464 (Iowa 2004). We agree with the district court.

IV. PERMANENT AND TOTAL DISABILITY.

Magna argues a correct application of the law to the facts does not support an award of permanent total disability.

Total disability does not equate to a state of absolute helplessness. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 633 (Iowa 2000). Rather, "[s]uch disability occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to perform." *Id*. The issue is whether "there [are] jobs in the community the employee can do for which the employee can realistically compete." *Second Injury Fund v. Shank*, 516 N.W.2d 808, 815 (Iowa 1994). "Thus, the focus is not solely on what the worker can and cannot do; the focus is on the ability of the worker to be gainfully employed." *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 266 (Iowa 1995).

We agree with and adopt the district court's resolution of this issue.

> [Hill] was fifty-two years old at the time of the initial arbitration hearing. She lacks even a high school education and was a below-average student. Her work experience consists primarily of jobs where she performed tasks similar to what she performed while employed [at Magna]. Following the work-related injury, [Hill] has difficulty even performing typical household chores. The court concludes [the agency] articulated the appropriate factors and applied them to the facts of this case such that the agency's decision to award permanent total disability is not affected by a misapplication of law to fact. Based on the administrative record, it was not irrational, illogical or wholly unjustifiable to conclude [Hill] is clearly unable to perform the tasks to which she is suited.

Costs are taxed to Magna.

AFFIRMED.