

**IN THE COURT OF APPEALS OF IOWA**

No. 0-891 / 10-0872  
Filed February 23, 2011

**KONE, INC., ZURICH NORTH AMERICA,  
and ACE AMERICAN,**  
Petitioners-Appellees,

**vs.**

**BEN HARRISON,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,  
Judge.

A workers' compensation claimant appeals a district court ruling reversing  
a decision of the workers' compensation commissioner. **REVERSED AND  
REMANDED.**

Matthew J. Petrzelka of Petrzelka & Breitbach, P.L.C., Cedar Rapids, for  
appellees.

Bob Rush of Rush & Nicholson, P.L.C., Cedar Rapids, for appellant.

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

**VAITHESWARAN, J.**

Benjamin Harrison appeals a district court ruling reversing a decision of the workers' compensation commissioner.

***I. Background Facts and Proceedings***

Harrison was employed by KONE, Inc. as an elevator repairman. He worked for the company for thirty-four years.

In 2003, Harrison sustained an on-the-job injury to his left knee. He also sustained two on-the-job injuries to his right shoulder, the second occurring on March 14, 2007. Harrison retired on April 1, 2007, raising the question of whether he retired because of his injuries or whether his retirement was a pre-planned, age-related separation from the workforce.

Harrison filed two benefit claims with the Iowa Workers' Compensation Commissioner, which were consolidated for hearing. A deputy workers' compensation commissioner determined that Harrison was only entitled to eleven weeks of permanent partial disability benefits for his leg injury, which had already been paid, and no permanency/industrial disability benefits for his right shoulder. The deputy awarded no healing period benefits and no penalty benefits. On intra-agency appeal, the workers' compensation commissioner reversed the deputy and determined that Harrison was entitled to industrial disability benefits, healing period benefits, and penalty benefits.

KONE and its insurer sought judicial review of the final agency decision. The district court reversed the agency's decision and Harrison appealed.

## **II. Analysis**

### **A. Shoulder Injury<sup>1</sup>**

The commissioner determined that Harrison suffered a 35% loss of earning capacity as a result of his shoulder injury, entitling him to 175 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) (2009). On judicial review, the district court reversed the commissioner, concluding Harrison “failed to sustain his burden of proof that his injury of March 14, 2007, was a proximate cause of permanent disability.” Harrison complains that the district court improperly reweighed the evidence.

The statutory standard governing judicial review of agency fact findings states that we are bound by the agency’s determinations of fact which are clearly vested in the discretion of the agency if those determinations are supported by substantial evidence in the record before the court when that record is viewed as a whole. Iowa Code § 17A.19(10)(f). “Substantial evidence” is defined as

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.

*Id.* § 17A.19(10)(f)(1). “When that record is viewed as a whole”

means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency’s

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<sup>1</sup> The evidence supporting the agency decision with respect to Harrison’s leg injury is not at issue in this appeal.

explanation of why the relevant evidence in the record supports its material findings of fact.

*Id.* § 17A.19(10)(f)(3). Under these statutory standards, we are obligated to judge the evidence that detracts from the agency finding as well as the evidence that supports it and consider determinations of veracity made by the fact finder who personally observed the witnesses. *But see Arndt v. City of Le Claire*, 728 N.W.2d 389, 395 (Iowa 2007) (considering only evidence supporting agency fact findings and concluding trial and appellate courts “improperly weighed the evidence”). The district court did so, reviewing the entire certified administrative record and transcript and stating the deputy commissioner before whom Harrison personally appeared, was “in the best position to assess the credibility of witnesses.” The deputy explicitly found Harrison not credible. We believe the district court was authorized and indeed required to consider the deputy’s veracity determination. See Iowa Code § 17A.19(10)(f)(3).

That said, “[e]ven when credibility is involved, the agency, not the hearing officer, is charged with the authoritative responsibility to decide what the evidence means under the governing statute.” *Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm’n*, 322 N.W.2d 293, 295 (Iowa 1982). In other words, it is not the deputy’s proposed decision, but the commissioner’s final decision, that is subject to judicial review. *Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 358 (Iowa 1999) (“[T]he deputy industrial commissioner’s proposed findings are not a consideration on judicial review. Only final agency action is subject to judicial review.”). “This does not mean a disagreement on the facts between the officer and the agency may not affect the substantiality of the evidence supporting the

agency decision.” *Iowa State Fairgrounds*, 322 N.W.2d at 295. As our supreme court has explained:

When the agency decision is attacked on the substantial evidence ground in section [17A.19(10)(f)], the district court must examine the entire record. This includes the hearing officer’s decision. The hearing officer’s decision is not evidence, but his findings may affect its weight when credibility issues are involved.

*Id.* (citations omitted); see also Iowa Code § 17A.12(6)(e), (f) (stating the record in a contested case “shall include . . . [a]ll proposed findings” and “[a]ny decision, opinion or report by the officer presiding at the hearing”). It is clear, therefore, that the deputy’s veracity determination was one consideration in the total calculus of whether the commissioner’s fact findings were supported by substantial evidence.

As noted, the commissioner determined that Harrison suffered a 35% loss of earning capacity.

Measuring the employee’s loss of earning capacity requires the commissioner to consider the employee’s functional impairment, age, education, work experience, and adaptability to retraining, to the extent any of these factors affect the employee’s prospects for relocation in the job market.

*Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998).

The commissioner found that Harrison was sixty-seven years old at the time of the arbitration hearing and had no formal education beyond high school. His work history included many physical labor positions. These facts are undisputed.

The commissioner diverged from the deputy in assessing Harrison’s functional impairments. He made the following determination:

In finding that claimant had not sustained permanent disability as a result of his right shoulder injury the presiding deputy relied primarily upon the medical opinions of Dr. Cobb, the treating physician. I do not share the deputy's reliance upon the opinion of Dr. Cobb—an opinion that claimant had no permanent impairment or permanent work restrictions. Dr. Cobb's opinion is contradicted by claimant's reasonable complaints of ongoing loss of function and pain that are consistent with those of others following similar shoulder surgery. Further, Dr. Cobb's assessment of zero permanent impairment is not supported by the *AMA Guides*, Fifth Edition which he claims to have utilized in his assessment of impairment. Dr. Manshadi's report cites to specific sections of the *AMA Guides*, includes specific range of motion testing results, and is in accord with claimant's ongoing symptoms following his surgical repair of the right shoulder. It is therefore concluded that claimant has sustained a permanent impairment of eight percent of the right upper extremity, which according to Table 16-3 of the *Guides* is equal to five percent of the whole person. Dr. Manshadi's restrictions for the right shoulder are also found to be most persuasive.

No useful purpose would be served by detailing the medical evidence supporting and detracting from this determination. Suffice it to say that the commissioner's determination concerning Harrison's functional impairment is supported by substantial evidence.

We turn to the deputy's adverse credibility determination. The deputy stated:

Although the claimant testified that his knee and shoulder were factors in his decision to retire, *this testimony is not credible*. The claimant admitted that he made the decision to retire, in effect, to remove himself from the workplace on January 15, 2007, before his right shoulder injury. Although he said he was not "locked in" on that decision, the greater weight of the evidence is that the claimant was attempting to coordinate his retirement from KONE with social security in order to obtain the maximum benefits. The claimant admitted that he made no effort to withdraw his application for retirement at any time before his actual retirement. His pension was approved on March 2, 2007, which was before any right shoulder injury.

(Emphasis added). The commissioner rejected this determination based on other evidence in the record. He stated:

Prior to the injury of March 14, 2007, claimant had filled out retirement papers which were dated January 15, 2007. Claimant ultimately retired on March 31, 2007, and his pension was effective on April 1, 2007, when he was 65 years and 8 months of age. Claimant testified that his knee and shoulder were factors in his decision to retire. While the presiding deputy commissioner did not find such testimony credible, the undersigned does not agree with her assessment. While the decision to fill out retirement papers was completed on January 15, 2007, a date the deputy noted was prior to his significant injury of March 14, 2007, this ignores claimant's stipulated left knee injury and his right shoulder muscle pain caused by his job duties performed [at] St. Wenceslaus Church. Further, claimant testified that when he filled out his paperwork for retirement he was not locked into the ultimate decision to retire on a specific date. Claimant's decision to retire on March 31, 2007, rather than perform work for an additional year and a half, resulted in a loss of approximately \$300.00 per month in pension benefits.

Again, the record contains substantial evidence to support the commissioner's rejection of the deputy's adverse credibility determination. The commissioner found that Harrison sustained an injury after his retirement paperwork was submitted, and he proceeded to retire with less than maximum benefits, suggesting his injury was a factor in his retirement. While we might have been less inclined to reject the deputy's credibility determination in light of her unique ability to assess Harrison's demeanor, we cannot conclude the commissioner acted without an evidentiary basis.

As the commissioner's determination of a 35% loss of earning capacity is supported by substantial evidence, we reverse the district court.

**B. Healing Period Benefits**

Harrison next contends the district court erred in overturning the commissioner's determination that he was entitled to healing period benefits for his shoulder injury. Healing period benefits are payable to an employee as follows:

If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code § 85.34(1). The real dispute is the effect of Harrison's retirement on his claim for healing period benefits.

Following his retirement, Harrison underwent a surgical procedure known as right shoulder arthroscopy. The commissioner determined that Harrison was entitled to healing period benefits for a four-month recuperation period. The defendants do not dispute that, but for Harrison's retirement, he would have been entitled to these benefits. Given the commissioner's determination that Harrison's retirement was precipitated in part by his workplace injuries, a determination that we have found was supported by substantial evidence, we conclude the award of healing period benefits was justified. See 4 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 84.04(2), at 84-18 to 84-20 (2010) (stating compensation should be denied when the claimant has "quit his former job for reasons having nothing to do with the injury," but noting



that “[i]t goes without saying that if claimant quits because of inability to continue to perform the former duties, or *a fortiori* because of doctor’s orders requiring him or her to seek lighter work, the quitting forms no impediment to a finding of compensable disability”).

### **C. Penalty Benefits**

Iowa Code section 86.13 provides:

If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers’ compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

The commissioner awarded penalty benefits for delays in the payment of benefits associated with Harrison’s left knee injury. The commissioner found that the total benefits subject to late payment were \$7982.48 and imposed a fifty percent penalty of \$3991.24. The district court reversed this determination.

Harrison contends this was error. The defendants do not counter with any evidence that would have justified a delay in the payment of these benefits. See *City of Madrid v. Blasnitz*, 742 N.W.2d 77, 81 (Iowa 2007) (stating that once an employee shows a delay or denial in payment of benefits, the burden shifts to the defendant to prove a reasonable cause or excuse for delay or denial). Instead, they assert that Harrison did not timely raise the issue of a “delay.”

To the contrary, Harrison raised the issue in his pre-hearing statement of issues. Although he did not use the word “delay,” he specifically cited Iowa Code section 86.13, quoted above, which addresses “a delay in commencement or termination of benefits.” Iowa Code § 86.13. We believe this was sufficient to

alert the agency and the defendants to the fact he was seeking penalties for delays in the payment of benefits. As the issue was raised and no other challenge is being made to the penalty award, we affirm the commissioner's award of penalties and reverse the district court's rejection of those payments.

***III. Disposition***

We reverse and remand for entry of judgment affirming the commissioner's decision.

**REVERSED AND REMANDED.**