IN THE COURT OF APPEALS OF IOWA

No. 0-892 / 10-0943
Filed February 9, 2011

TRACO and AMERICAN ZURICH INSURANCE COMPANY,
Petitioners-Appellees/Cross-Appellants,

vs.

WILLIAM H. DUMLER,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Artis I. Reis, Judge.

William Dumler appeals from the district court's ruling on judicial review reversing the workers' compensation commissioner's award of permanent total disability benefits. **REVERSED AND REMANDED.**

Richard B. Maher, Omaha, Nebraska, for appellant.

Christopher Spencer, Timothy W. Wegman, and Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron & Wegman, L.L.P., West Des Moines, for appellees.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

DANILSON, J.

William Dumler appeals from the district court's ruling on judicial review upholding the workers' compensation commissioner's finding that Dumler suffered a work-related injury on August 29, 2006, but reversing the commissioner's permanent total disability award. The only expert opinion on record concluded Dumler suffered a work-related injury and the injury and subsequent hip replacement surgery resulted in a fifteen percent permanent functional impairment. A subsequent vocational evaluation found Dumler had been rendered unemployable and thus sustained a 100% industrial disability. The commissioner awarded permanent total disability benefits and determined Dumler was an odd-lot employee. The district court reversed on finding Dumler failed to prove his disability was caused by the work injury and that he was an odd-lot employee. We conclude the district court improperly weighed the evidence in overruling the commissioner's finding that Dumler's work-related injury proximately caused his disability. Because Dumler also presented substantial evidence that he met the criteria of an odd lot employee, we reverse the judgment of the district court and remand the case for the district court to enter judgment affirming the decision of the workers' compensation commissioner.

I. Background Facts and Proceedings.

William Dumler sought workers' compensation benefits from his former employer, Traco, and its insurer, Zurich Insurance Company, for an alleged work-related injury. Traco rejected the claim, and a hearing was held before a deputy workers' compensation commissioner on December 12, 2008.

Dumler, age seventy-one at the time of trial, has a ninth-grade education and has been previously employed with the National Guard, poultry and dairy factory labor, power plant maintenance, street maintenance, farm work, railroad joint straightener, and construction laborer. In September 1998, at the age of sixty-one, Dumler began working for Traco assembling doors and windows. He began collecting Social Security retirement benefits at age sixty-five, but intended to continue to work as long as possible.

Midmorning on August 29, 2006, Dumler reached for pieces of a door and caught his right leg on a torn fatigue mat. His right leg twisted and he fell into an assembly table. Dumler felt a stinging sensation in his right hip. Dumler continued to work and finished his shift, but recalled experiencing increasing pain in his right hip. Dumler testified he did not report the incident to his supervisor that day because "[w]e tried to keep a pretty good record there at Traco [of not having accidents]." Dumler worked the following day as well, but went to his family practice clinic on Thursday, August 31, 2006, where he was seen by physician's assistant Don Scarborough.

Scarborough's office notes of the August 31, 2006 visit indicate Dumler

> comes in today with right hip pain off and on for the last couple of days. It is getting to the point where he can hardly walk. He points to his right buttock where it hurts. He has had disk disease and degenerative joint disease of his back. He states he cannot really tell if it is part of that or something new.

Scarborough also noted a history of prostate cancer. Dumler testified he could not recall if he told Scarborough he fell at work during that office visit. Scarborough prescribed pain medication and indicated an MRI would be ordered if pain did not improve. Because stretching activities performed in the office

seemed to improve Dumler's pain, Scarborough wrote: "we are convinced that this is probably more of a muscular issue than a true neurologic issue acutely." Scarborough provided a medical excuse from work for two days.

Dumler's wife, Dorothy Dumler, recalled her husband telling her about his August 29, 2006 fall when he got home from work that day. He told her "he fell at work by catching his foot, tangling his foot up in a rug." She stated he went to work the following day and when he came home "he was hurting worse." Dorothy made the August 31, 2006 appointment with Scarborough for Dumler.

Upon his return to work following the long Labor Day weekend, Dumler reported the August 29 incident to his employer. The incident report notes Dumler "had extreme pain in his right hip" the next day.

On September 15, Dumler was seen by Dr. William Artherholt complaining of "increasing pain in his right iliac crest, sacroiliac area, and now having more pain going down his right leg with some numbness and tingling." Because of Dumler's prostate cancer history, the metastatic disease needed to be evaluated. Dr. Artherholt scheduled Dumler for an MRI and prescribed pain medication. Dr. Artherholt restricted Dumler from working "until further notice."

On September 21, 2006, Dumler underwent an MRI of his right hip. The report by Dr. Bruce Baron to Scarborough noted an "ill defined 3 cm wide area of marrow replacement involving the anterior aspect of the junction of head and neck of the right femur." Dr. Baron wrote it "may represent tumor replacement due to prostate carcinoma with an incomplete small fracture line or edema mimicking tumor with a small incomplete stress fracture line."

Dumler was referred to orthopedic surgeon, Dr. Clifford Kent Boese, who evaluated him for right hip pain on October 4, 2006. Dumler told Dr. Boese he twisted his right hip and stumbled a bit at work and then had a stinging pain in his hip. Dr. Boese tentatively diagnosed Dumler with a nondisplaced femoral neck fracture. Dumler's condition did not improve with conservative treatment, and Dr. Boese recommended hip replacement.

On January 16, 2007, Dumler underwent a hip replacement. During the surgery, Dr. Boese noted evidence of degenerative changes, a partial fracture, and no evidence of a tumor. Dr. Boese opined that eighty percent of the cause of Dumler's pain was from the nondisplaced fracture. Dumler was restricted from working until April 5, 2007, when he was "released without restrictions" by Theresa Gallo, P.A.-C. Yet Ms. Gallo noted, "Work Status: No lifting greater than 30 pounds/Retired."

Dumler was terminated by Traco on April 23, 2007. But Dumler continued to have pain problems after the hip replacement surgery. Dr. Boese testified that x-rays taken on October 3, 2007, "showed no complications regarding his hip, and I felt the pain was due to his back problem." A bone scan was ordered "to rule out any metastatic cancer lesion from his prostate and an MRI of his back to see if we could figure out where he was having pain from at this point." The bone scan showed "no evidence of metastatic lesion from the prostate and no evidence of loosening or infection of the hip joint." Dumler also underwent an MRI but did not follow up with Dr. Boese within a week as requested.

On March 28, 2008, Dr. Boese indicated in a letter to Dumler's legal counsel that Dumler "sustained a femoral neck fracture of the right hip, which

was a direct result of a work accident on August 29, 2006 at Traco." Dr. Boese also stated the injury was treated with a hip replacement; "maximum medical improvement in regards to his work injury and subsequent hip replacement" was reached as of January 16, 2008; and Dumler's continued complaints of low back pain were not related to the work injury.

On April 17, 2008, Dumler was seen by physician's assistant Theresa Gallo of Dr. Boese's practice. She indicated he was doing well at that time, was not complaining of pain in his hip area, and was walking well. A hip x-ray showed no problems with the hip replacement, and Gallo released him without restrictions.

On October 16, 2008, Dr. Boese responded to a letter from Dumler's legal counsel, stating with a reasonable degree of medical certainty:

> William Dumler sustained injuries resulting in permanent impairment as a result of a work accident at Traco on August 29, 2006. This resulted in hip replacement surgery to the right hip. The patient was seen in the Clinic on April 17, 2008 for a checkup, two [sic] years following his total hip arthroplasty. At that time Mr. Dumler was doing well with the hip replacement. X-rays showed the implants in good position without sign of complication.
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> According to AMA Guides to Evaluation of Permanent Impairment, 5th Edition, Table 17-33, Mr. Dumler has a 15% whole person impairment. He has reached maximum medical improvement in regards to his hip injury and subsequent surgery. His impairment is permanent in nature.
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> The hip surgery for Mr. Dumler and subsequent follow up was a direct result of his August 29, 2006 work injury.
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> Mr. Dumler will require annual checkup appointment with x-rays indefinitely to monitor his hip replacement.
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> Mr. Dumler has no work restrictions in regards to his hip injury and subsequent hip surgery.

An October 23, 2008 functional capacity evaluation (FCE) by Doug Page noted Dumler had numerous limitations including shortness of breath and rapid

elevation in heart rate with all physical activity, unsteady gait pattern when walking, extreme difficulty in crouching and kneeling activities, difficulties lifting, tremors in both hands, balance difficulties, and an inability to stand for prolonged periods of time. The FCE indicated Dumler capable of "Sedentary-Light" work.

A vocational evaluation was conducted on November 10, 2008, by Alfred J. Marchisio. He summarized the evaluation as follows:

> I would start my final opinions by stating that simply because Mr. Dumler is now 71 years old and has a disabling condition, one would not automatically consider a person with these circumstances to be totally disabled.
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> However, Mr. Dumler's functional limitations/restrictions are so stringent that he cannot return to his customary occupations, i.e. manufacturing or construction, which he has done since 1971 until August 2006.
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> Furthermore, he has limited residual capabilities to work in alternate occupations which would be within a reasonable commute of his home in Villisca, IA. Normally, if a person who had physical restrictions was still employable, I would consider a job market to include Red Oak, Corning, Clarinda and Shenandoah, IA to be a reasonable commute. However, Mr. Dumler's circumstances are that he cannot tolerate walking and standing, has limited capabilities with climbing, squatting, bending, et cetera.
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> Certainly, he does not have any skills to work in clerical or office occupations, which would allow him to sit the majority of the day. Otherwise, there are extremely few assembly jobs within a 30-mile radius which Mr. Dumler would have access to.
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> I have considered the notion that perhaps Mr. Dumler might be considered an odd-lot employee. However, in my opinion his services are beyond the phrase "so limited in quality, dependability, or quantity, that a reasonably stable market for them does not exist." In Mr. Dumler's case, there is not a labor market at all in my opinion which he can now access based on the chronic nature of his impairment and the severe limitations which have resulted from the injury.
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> It is my professional opinion that William Dumler has been rendered unemployable, or has sustained 100 percent industrial disability as a result of the industrial accident of 8/29/06. It is my opinion that this condition is permanent and that vocational rehabilitation services will not be effective and will not change his unemployed status.

On November 14, 2008, Dr. Boese "adopt[ed] the restrictions provided in the [FCE] report."

The deputy commissioner found "[t]he evidence of Dr. Boese, the claimant, and Dorothy Dumler provide convincing evidence that the claimant suffered an injury that arose out of and in the course of employment." The deputy found the hip injury—"generally an injury to the body as a whole and not an injury to the lower extremity"—resulted in Dumler's involuntary withdrawal from the labor market. The deputy also found the employer had failed to show any disability resulting from Dumler's preexisting conditions should be apportioned and concluded Dumler had suffered 100% industrial disability. The deputy awarded permanent total benefits.

The deputy also found Dumler had established a prima facie of total disability by producing substantial evidence he was not employable in the competitive labor market, and Traco had failed to produce evidence of suitable employment. Consequently, the deputy also determined that Dumler was an odd-lot employee entitled to permanent total disability.

The commissioner adopted the deputy's ruling on Traco's intra-agency appeal. Traco then filed a petition for judicial review.

The district court reversed the award of permanent total disability benefits. The district court concluded, "There are no medical opinions supporting a causal relationship." The court wrote further:

> In light of the opinion of Dr. Boese that Claimant's current complaints and restrictions are not causally related to the alleged incident of 8/29/06, and the absence of any contrary opinion, the Court finds Claimant failed to meet his burden of proof as to the causal relationship between his current complaints and limitations

> as a matter of law. The finding of the agency to the contrary is further unsupported by substantial evidence in the record.

The district court noted Dr. Boese adopted the restrictions set out in the FCE, but stated that because "those restrictions stem from Claimant's preexisting degenerative back condition and are not related to the alleged work incident of 8/29/06." The court thus rejected the odd-lot employee finding of the commissioner as well. While affirming the commissioner's finding that Dumler had sustained a work-related injury on August 29, 2006, the district court set aside the award of permanent total disability benefits.

Dumler appeals, in essence contending the commissioner's findings were supported by substantial evidence and the district court erred in finding otherwise. On cross-appeal, Traco contends the district court erred in concluding there was substantial evidence to support the commissioner's finding that Dumler's hip injury arose out of and in the course of employment.

II. Scope and Standard of Review.

> A district court reviews agency action pursuant to the Iowa Administrative Procedure Act. When we review a district court decision reviewing agency action, our task is to determine if we would reach the same result as the district court in our application of the Act.
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> The district court may reverse or modify an agency's decision if the agency's decision is erroneous under a ground specified in the Act and a party's substantial rights have been prejudiced. The district court or an appellate court can only grant [petitioner] relief from the commissioner's decision if a determination of fact by the commissioner "is not supported by substantial evidence in the record before the court when that record is viewed as a whole."

Arndt v. City of Le Claire, 728 N.W.2d 389, 393 (Iowa 2007) (citations omitted).

III. Analysis.

A. Work-related injury. We first address Traco's contention on cross-appeal that there is not substantial evidence supporting the finding that Dumler sustained an injury on August 29, 2006. Traco relies heavily on the *absence* of any reference in Scarborough's August 31, 2006 medical notes that Dumler fell at work. We reject Traco's argument.

"It is the commissioner's duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue." *Id.* at 394–95. The commissioner found Dumler proved he suffered an injury on August 29. The commissioner's factual finding that Dumler sustained a work injury on August 29, 2006, is supported by substantial evidence. We acknowledge that Dumler delayed reporting the injury to his employer for a few days and Scarborough's notes of August 31, 2006, do not reference a work injury. Notwithstanding, Dumler explained that on August 29, 2006, he tripped on a torn mat while carrying parts of a patio door to an assembly table, twisting his foot and falling into the assembly table. He felt a sting in his right hip at the time of the accident, and over time had progressively increasing pain in his right hip. The commissioner found Dumler to be a credible witness. Dorothy Dumler recalled that her husband told her of the incident that day when he came home from work and observed that he was hurting. Scarborough's notes of August 31 note Dumler "comes in today with right hip pain off and on for the last couple of days." Dumler also reported both the fall and hip pain to Dr. Boese.

As the *Arndt* court noted:

> Just because the interpretation of the evidence is open to a fair difference of opinion does not mean the commissioner's decision is not supported by substantial evidence. An appellate court should not consider evidence insubstantial merely because the court may draw different conclusions from the record.

Id. (citations omitted).

The commissioner concluded Dumler had proved he suffered a work-related injury. The district court affirmed this ruling, as do we.

B. Sufficiency of evidence of causation. This leads to the question of whether Dumler proved the injury is a proximate cause of the disability for which he seeks benefits. *See Holmes v. Bruce Motor Freight, Inc.*, 215 N.W.2d 296, 297 (Iowa 1974) ("The claimant has the burden of proving by a preponderance of the evidence that some employment incident or activity brought about the health impairment on which he bases his claim.").

Dumler contends there is substantial evidence in the record his August 29, 2006 work-related injury is a proximate cause of his disability. The district court ruled there was "no competent evidence in this case that the alleged incident impaired Claimant's earning capacity. He has no restrictions or symptoms related to that event." We, however, conclude the district court improperly weighed the evidence before the commissioner and thus erred.

As already noted, in the context of workers' compensation law, the claimant has the burden of proving by a preponderance of the evidence that some employment incident brought about the health impairment on which the claimant's claim is based. *Iowa Beef Processors, Inc. v. Burmeister*, 301 N.W.2d 768, 770 (Iowa Ct. App. 1980). We have already upheld the commissioner's ruling that Dumler suffered a work-related injury on August 29, 2006.

For workers' compensation purposes, a cause is proximate if it is a substantial factor in bringing about the result. *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348, 354 (Iowa 1980). "It only needs to be one cause; it does not have to be the only cause." *Armstrong Tire & Rubber Co. v. Kubli*, 312 N.W.2d 60, 64 (Iowa Ct. App. 1981). "A preponderance of evidence exists when the causal connection is probable rather than merely possible." *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998).

Whether there is a causal connection between the injury and the impairment is in the domain of expert testimony. *See Dunlavey v. Economy Fire & Casualty Co.*, 526 N.W.2d 845, 853 (Iowa 1995). We cannot agree with the district court's conclusion that "[t]here are no medical opinions supporting a causal relationship."

Dr. Boese—the only expert opinion testimony—was of the opinion that Dumler sustained injuries resulting in permanent impairment as a result of a work accident at Traco on August 29, 2006. In his letter of October 16, 2008, he stated "with a reasonable degree of medical certainty" that "Dumler sustained injuries resulting in permanent impairment as a result of a work accident at Traco on August 29, 2006"; the injury "resulted in hip replacement surgery to the right hip"; "[a]ccording to AMA Guides to Evaluation of Permanent Impairment, 5th Edition, Table 17-33, Mr. Dumler has a 15% whole person impairment"; "[h]is impairment is permanent in nature"; and on November 11, 2008, Dr. Boese adopted the restrictions noted in Marchisio's vocational evaluation. This constitutes substantial evidence to support the causation finding of the commissioner, and the district court erred in ruling otherwise.

C. Industrial disability. The district court, however, was apparently convinced by Traco's argument that because Dumler had no work restrictions as a result of his hip replacement, Dumler had failed to prove his injury was a proximate cause of the disability for which he seeks benefits. We acknowledge that Dr. Boese's October 16, 2008 letter includes the statement, "Mr. Dumler has no work restrictions in regards to his hip injury and subsequent hip surgery."[1] But having "no work restrictions in regards to his hip injury" does not alter the fact that Dumler had no earning capacity after suffering a permanent fifteen percent whole person impairment. *See Sherman*, 576 N.W.2d at 320-21 (noting unscheduled injuries are compensated by determining the employee's industrial disability). As observed by our supreme court:

> Industrial disability measures an injured worker's lost earning capacity. Factors that should be considered include the employee's functional impairment, age, intelligence, education, qualifications, experience, and the ability of the employee to engage in employment for which he is suited. 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.
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> Even more important for purposes of our discussion here is the concept that industrial disability rests on a comparison of what the injured worker could earn before the injury as compared to what the same person could earn after the injury.

Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 265–66 (Iowa 1995) (citations omitted).

Traco wishes to be relieved of responsibility for Dumler's disability, arguing it is a result of an underlying preexisting degenerative condition. But the record before us is that prior to his hip injury, Dumler was able to perform the functions of his employment. In fact, over eight years of employment at Traco,

[1] Dr. Boese's letter is consistent with his deposition testimony.

Dumler had only missed one day of work. After his hip injury, as Marchisio found, Dumler had *no* earning capacity because "he [could] not return to his customary occupations," he had "limited residual capabilities to work in alternate occupations within a reasonable commute," and "there is not a labor market at all . . . which he can access." The commissioner rejected the argument that apportionment was proper here.

As noted in *Nelson*, 544 N.W.2d at 264, "An employer's liability for an employee's industrial disability is complicated when that disability results in part from a prior injury or condition." Here, the commissioner ruled the employer had failed to show any disability resulting from Dumler's preexisting conditions should be apportioned and thus Traco was fully responsible for Dumler's 100% industrial disability. This is consistent with the applicable principles of apportionment summarized in *Nelson*:

> Iowa applies a rule of apportionment in limited situations. When a prior injury, condition or illness, unrelated to employment, independently produces an ascertainable portion of an injured employee's cumulative industrial disability, the employer is liable only for that portion of the industrial disability attributable to the current injury. In other words, the industrial disability is apportioned between that caused by the work-related injury and that caused by the nonwork-related condition or injury. The employer is liable only for the work-related portion.
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> It is important to recognize two limitations on this rule. First, the prior injury or condition must cause an "ascertainable portion" of the ultimate industrial disability. Thus, if the portion of the industrial disability resulting from the pre-existing, nonwork-related injury or condition cannot be determined, the employer is liable for the full industrial disability of the employee.
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> Second, the prior injury or condition must "independently" produce some degree of *industrial* disability before the second injury. *Hence, the apportionment rule does not apply where the prior condition or injury has not caused any industrial disability.* Similarly, the apportionment rule does not apply where the second

> injury aggravates the pre-existing condition. In these situations, the employer is liable for the full industrial disability.

Id. at 264–65 (second italics added). Because Dumler's preexisting conditions had no effect on his earning capacity, apportionment was not proper. *See Bearce v. FMC Corp*., 465 N.W.2d 531, 536 (Iowa 1991).

Dr. Boese opined Dumler suffered a fifteen percent whole body impairment as a result of the August 29, 2006 injury and subsequent hip replacement. That impairment resulted in 100% industrial disability. *See Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 103 (Iowa 1985) (noting industrial disability is determined after considering not only bodily impairment, but also the worker's age, intelligence, education, qualifications, experience, and the effect of the injury on the worker's ability to obtain suitable work). "When the combination of factors precludes the worker from obtaining regular employment to earn a living, the worker with only a partial functional disability has a total industrial disability." *Id.* The commissioner found Dumler had suffered a 100% industrial disability for which Traco was responsible. Substantial evidence supports the commissioner's findings, and the district court erred in reversing the commissioner's award.

D. Odd-lot employee. The district court also concluded, "[t]he Commissioner's award of permanent total disability is affected by error of law as it relates to the odd-lot doctrine due to the lack of any medical opinion supporting causation." For the reasons previously recited, we disagree. We also conclude the agency considered the appropriate factors in determining Dumler met the

criteria as an odd-lot employee, and there is substantial evidence to support the agency's reasoned conclusion.

IV. Conclusion.

The commissioner awarded permanent total disability benefits, and the district court reversed on finding Dumler failed to prove his disability was caused by the work injury. Because the district court improperly weighed the evidence to overrule the workers' compensation commissioner's finding that Dumler's work-related injury proximately caused the disability on which his claim is based, we reverse the judgment of the district court and remand the case for the district court to enter judgment affirming the decision of the workers' compensation commissioner.

REVERSED AND REMANDED.