

IN THE COURT OF APPEALS OF IOWA

No. 0-897 / 10-1067
Filed February 9, 2011

EATON HYDRAULICS,
Plaintiff-Appellant,

vs.

SUSAN HIGGINS,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel,
Judge.

Employer appeals from the district court's review decision that affirmed the
agency decision awarding employee benefits for a permanent total disability.

AFFIRMED.

Tiernan T. Siems of Erickson & Sederstrom, P.C., Omaha, Nebraska, for
appellant.

Dennis L. Hanssen and Wendy D. Boka of Hopkins & Huebner, P.C., Des
Moines, for appellee.

Considered by Potterfield, P.J., and Doyle and Danilson, JJ.

DANILSON, J.

Eaton Hydraulics appeals from the district court's judicial review decision affirming the agency decision awarding permanent total disability to Susan Higgins. For the reasons set forth below, we affirm the district court's decision.

Susan Higgins began working at Eaton Hydraulics in March 2000.¹ She passed her pre-employment physical with no physical limitations. Higgins worked in a number of different areas, but eventually began working in the heavy duty wash. Her job duties included loading and unloading parts weighing thirty-five pounds onto overhead hooks or into overhead baskets and cleaning the parts with an air gun.

Higgins sought treatment for wrist pain beginning in June 2001. She thereafter sought treatment for forearm pain. Dr. Brian Dvorak² evaluated Higgins and imposed a lifting restriction and recommended physical therapy. After switching to a light duty job, Higgins experienced an increase in elbow pain. In February 2002, Dr. Dvorak diagnosed Higgins with "bilateral medial epicondylitis and left lateral epicondylitis." In March 2003, Higgins reported left shoulder and extremity pain and stated the pain had gradually worsened since December 2002. She was diagnosed with "left rhomboid strain and left lateral epicondylitis." Dr. Dvorak imposed work restrictions and recommended home exercises, physical therapy, cryotherapy, and anti-inflammatory medication. He

¹ At the time of the arbitration hearing, Higgins was fifty-six years old. She obtained her GED in 1978, and has no further education. Prior to working for Eaton, Higgins worked as a waitress, dry cleaner, convenience store clerk, baker, and an egg sorter. Higgins did not experience any problems with the physical demands of those jobs.

² Eaton sent Higgins to be evaluated by Dr. Dvorak.

opined that Higgins's injuries were work related. Because she still experienced pain, Higgins continued to be seen by physicians for shoulder and arm complaints from March 2003 through August 2004.

On September 14, 2004, physical therapist Jay Herman performed a functional capacity evaluation (FCE) on Higgins. The FCE determined Higgins was capable of light duty work, and ordered the following restrictions:

- (i) Perform "light" duty work;
- (ii) Limit overhead reach and lift;
- (iii) Limit tasks requiring full elbow extension (pushing and pulling);
- (iv) Limit lifting to 5 pounds continuously, 10 pounds frequently, 20 pounds occasionally, and 25 pounds at most.

At Eaton's request, Dr. David Archer performed an independent medical exam on Higgins on October 15, 2004. Dr. Archer opined that Higgins had an eight percent upper left extremity impairment due to a loss of left shoulder range of motion, two percent upper extremity impairment due to loss of full elbow extension bilaterally, and two percent upper extremity impairment due to loss of right wrist range of motion and radial deviation. This combined to a twelve percent upper extremity impairment, or a seven percent whole body impairment. Dr. Archer also noted that "future work should preclude necessity for overhead reach or lift especially on the left."

Eaton also requested orthopedic surgeon Dr. Michael Donohue's review of the FCE performed on Higgins. On December 1, 2004, Dr. Donohue declared Higgins to be at maximum medical improvement, and indicated that Higgins's work restrictions set forth in the FCE were permanent.

Higgins did not return to work after August 2004. Eaton reviewed the FCE and was unable to find a position to accommodate Higgins's work restrictions. As a result, Eaton terminated Higgins's employment effective November 10, 2005.

In the meantime, Higgins filed two petitions for workers' compensation benefits, alleging injury dates of December 15, 2002, and August 8, 2004. In both she alleged she sustained "cumulative injury from performing work duties assigned" to her at Eaton. The cases were consolidated by the agency.

In January 2006, Eaton filed a motion to compel Higgins to undergo a second FCE, which a deputy workers' compensation commissioner denied. Eaton appealed the ruling to the commissioner. The commissioner denied the appeal concluding the deputy's ruling on the motion to compel was interlocutory, and grounds did not exist to grant an appeal from the interlocutory ruling.

After a hearing on Higgins's petitions, the deputy filed an arbitration decision in November 2006. Higgins appealed, and Eaton cross-appealed the arbitration decision. In December 2007, the commissioner filed an appeal decision, concluding the "findings of fact of the presiding deputy contain incomplete and inaccurate findings," and that the decision "failed to address the issues presented" to the deputy. The commissioner therefore remanded the matter for a "rehearing on the record previously presented," but added that "[i]f necessary, additional evidence or argument may be accepted upon approval of the presiding deputy commissioner."

Eaton filed a petition for judicial review, contending the commissioner should have made a determination regarding the issues presented on appeal. In July 2008, the district court dismissed Eaton's petition, concluding:

There are no final findings of fact or conclusions of law by the agency, therefore this Court would have nothing to review at this time. The Commissioner did not develop any fact findings and remanded the case back to the Deputy for further factual analysis. There are no Agency facts or issues to review at this time. The Deputy must first review all issues and make a complete fact finding. The Commissioner must then decide if the Deputy's decision should be affirmed. Only after the final decision of the Commissioner should this Court review the agency actions.

In August 2008, Eaton filed a motion to reopen the evidentiary record to allow additional evidence on remand. The remand deputy determined that no additional evidence was needed to render an opinion and denied Eaton's motion. A remand decision was filed in October 2008, in which the deputy determined: (1) Higgins sustained a work-related injury on December 15, 2002,³ that resulted in cumulative injuries to her left shoulder and upper extremities; (2) Higgins was permanently and totally disabled as a result of the injury; (3) commencement date of permanent total disability benefits was August 9, 2004, the date Higgins discontinued work at Eaton; (4) penalty benefits should be assessed because Eaton had no reasonable basis not to commence payment of permanent partial disability benefits; and (5) benefits should not have been suspended due to Higgins's failure to appear for a second FCE.

³ Because the deputy first found the injury in this case occurred on December 15, 2002, no discussion of liability as it related to the alleged August 8, 2004 injury was necessary.

In August 2009, the commissioner affirmed and adopted the deputy's remand decision as final agency action.⁴ On judicial review, the district court affirmed the agency's decision.

Eaton now appeals, contending the district court erred in its determination: (1) that the commissioner was correct in remanding the initial arbitration decision; (2) finding the commissioner did not err in affirming the remand decision where the remand deputy went beyond the scope of the review contemplated by the first appeal decision; (3) affirming the commissioner's finding that Higgins was entitled to penalty benefits; (4) failing to reverse the remand deputy's decision not to allow additional evidence on remand; (5) affirming the commissioner's finding that Higgins was completely and totally disabled; and (6) affirming the commissioner's finding that Higgins was not subject to sanctions due to her refusal to attend an additional functional capacity evaluation.

Higgins contends Eaton has not preserved error in respect to the first issue (that the district court erred in remanding this action after the first arbitration decision). We agree that Eaton may not now raise this issue, but rely upon the doctrine of the law of the case. See *State ex rel. Goettsch v. Diacide Distributors, Inc.*, 596 N.W.2d 532, 537 (Iowa 1999) ("The doctrine of the law of the case represents the practice of the courts to refuse to reconsider what has

⁴ The commissioner's appeal decision included additional analysis regarding Eaton's "attempted introduction of evidence and argument into the record of the case well after the hearing and after an order filed September 22, 2008, denied a request to present such evidence and arguments." The commissioner warned that the exhibits and argument Eaton sought to introduce contained information the remand deputy expressly refused to allow or consider. The commissioner further stated that "[r]egardless, such request [to introduce the exhibits] would have been denied," because the evidence was "irrelevant to the issues presented at the arbitration hearing as it was not probative of Higgins's employability on the date of the arbitration hearing."

once been decided.”). A ruling not objected to or excepted to, nor appealed from, is binding and conclusive on the appellate court as the law of the case concerning the matter to which it is directed. 5 C.J.S. *Appeal & Error* § 734, at 156-57 (1993); see also *State v. Steffens*, 282 N.W.2d 120, 121 (Iowa 1979). The initial ruling by the district court ordering the remand was not appealed from and became final. *Avoca State Bank v. Merchants Mut. Bonding Co.*, 251 N.W.2d 533, 539 (Iowa 1977) (“The ‘law of the case’ arises only after a ruling becomes final.”). We therefore decline to reconsider the district court’s initial ruling affirming the commissioner’s remand.

We further agree with Higgins’s contention that Eaton has not preserved error on the fourth issue (that the district court erred in failing to reverse the remand deputy’s decision not to allow additional evidence on remand). On September 22, 2008, the remand deputy determined that no additional evidence was needed to render an opinion and denied Eaton’s motion to reopen the evidentiary record. Eaton did not challenge this ruling on appeal to the commissioner. See Iowa Code § 86.24(1) (2009); Iowa Admin. Code r. 876-4.27(1) (providing that an appeal of a contested workers’ compensation case must be commenced within twenty days of the decision, order, or ruling by filing a notice of appeal); see also *Marovec v. PMX Indus.*, 693 N.W.2d 779, 783 (Iowa 2005). In respect to this issue, Eaton failed to exhaust its administrative remedies, see Iowa Code § 17A.19(1), and this issue is not properly before this court.

As for the remaining issues on appeal, we have reviewed the district court’s lengthy and well-written decision, and applied the standards of chapter

17A to determine whether our conclusions are the same as those reached by the district court. *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603 (Iowa 2005). We decline to add anything more to the district court's sound reasoning and conclusions in its review of the commissioner's decision. We find substantial evidence in the record supports the determination made by the commissioner on the remaining issues raised on appeal. See Iowa Code § 17A.19(10)(f); *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 864 (Iowa 2008). A reasonable person would find the evidence adequate to reach the same conclusions. *Heartland Specialty Foods v. Johnson*, 731 N.W.2d 397, 400 (Iowa Ct. App. 2007). We cannot therefore conclude the commissioner's decision was irrational, illogical, or wholly unjustifiable. Iowa Code § 17A.19(10)(m); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006).

We affirm the district court's order affirming the commissioner's decision awarding Higgins permanent total disability benefits.

AFFIRMED.