IN THE COURT OF APPEALS OF IOWA

No. 2-064 / 11-1041
Filed April 25, 2012

BERNARD KENT,
Petitioner-Appellee,

vs.

DIAMOND SHINE MANAGEMENT SERVICES, INC., and UNITED HEARTLAND,
Respondents-Appellants.

Appeal from the Iowa District Court for Linn County, Nancy A. Baumgartner, Judge.

An employer appeals the district court's judicial review decision reversing an order from the workers' compensation commissioner and ruling that the worker was totally disabled. **REVERSED.**

Thomas D. Wolle of Simmons, Perrine, Moyer & Bergman, P.L.C., Cedar Rapids, for appellants.

Thomas M. Wertz and Daniel J. Anderson of Wertz & Dake, Cedar Rapids, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

An employer and its insurer ask us to reinstate a decision by the workers' compensation commissioner finding its former employee, Bernard Kent, suffered a seventy percent loss in his earning capacity based on work-related injuries to his shoulders and arms. The district court reversed the commissioner and concluded Kent was permanently, totally disabled by applying both a traditional analysis and the odd-lot doctrine.

Given the level of deference we owe to the fact finder's credibility determinations in workers' compensation cases, we hold the commissioner's findings were supported by substantial evidence with regard to Kent's seventy percent disability rating and the inapplicability of the odd-lot doctrine. Moreover, the commissioner did not abuse his discretion by refusing to award Kent the costs incurred in retaining his vocational expert.

I. Background Facts and Proceedings

Kent, who is now fifty-five years old, has held a variety of jobs. After graduating from high school, he worked for two years stocking shelves and carrying groceries. He spent the next year repairing pallets. From 1977 to 1997, Kent worked for Mid-Continent Bottlers. His tenure there included working in quality control, operating a fork lift, and manning the production line. He earned $10.25 an hour before being laid off. For about two years, Kent owned a restaurant and tavern. In addition to ownership responsibilities, Kent cooked and bartended. After taking a year off from work, Kent started employment with Diamond Shine. From 2000 until 2004, he cleaned Hy-Vee grocery stores in

Cedar Rapids. That company fired Kent for taking too much break time. But in September 2005, Jason Cox, the son of Diamond Shine's owner, hired Kent to work at a separate entity Cox operated under the name Diamond Shine Management Services.[1]

Diamond Shine paid Kent twelve dollars an hour to clean floors at Target and Shopko stores located in Nebraska and Minnesota and Fairway stores in Iowa. His duties involved mopping, running floor cleaning machines, and stripping floors, as well as loading and unloading the equipment used. His hours varied each week, depending on customer demand.

On April 30, 2006, Kent injured his left and right shoulders while working for Diamond Shine. During a visit to the emergency room (ER) on May 2, 2006, he was diagnosed with tendonitis bursitis in the right shoulder. The ER physician administered a steroid injection in Kent's right shoulder and advised him to take pain medication.

Two days later, Kent visited Dr. Jeffrey Westpheling, who assessed Kent as experiencing right shoulder tendonitis with possible right cervical radiculitis. Dr. Westpheling prescribed physical therapy three times a week and placed Kent on work restrictions. Kent returned to Dr. Westpheling for follow-up assessments on May 12 and on May 26, 2006, at which time Dr. Westpheling ordered an MRI (magnetic resonance imaging), which showed moderate degenerative changes in the acromioclavicular (AC) joint.

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[1] For ease of reference, we will refer to the management services as Diamond Shine throughout the remainder of this opinion.

During a physical therapy session on May 31, 2006, Kent complained of aching in both shoulders. On June 2, 2006, Kent reported that the pain extended from both elbows to his shoulders as well. Dr. Westpheling referred Kent to Dr. Daniel Fabiano after noting Kent had not experienced any significant improvement in his shoulder.

Dr. Fabiano diagnosed Kent with shoulder pain and AC joint degenerative disease related to his May 2006 injury. After administrating two bone scans in July of 2006, Dr. Fabiano referred Kent to Dr. Sunny Kim. Dr. Kim recommended prolotherapy injections with dextrose to the right AC joint. Kent reported relief from pain as a result of Dr. Kim's September 2006 injections.

On November 9, 2006, Dr. Westpheling deemed Kent to be at maximum medical improvement. He recommended the following permanent work restrictions:

1. No lifting greater than 40 lb from floor to elbow height on an occasional basis. He may lift 20 lb from floor to chest on a frequent basis.
2. A sustained push/pull effort of no more than 30 lb for 50 feet on an occasional basis.
3. Maximum carry of 40 lb for 20 feet on an occasional basis.
4. Avoid repetitive lateral pushing and pulling activity with his right upper extremity which would preclude activities such as wet mopping, wiping, and scraping with his right upper extremity.
5. A maximum push/pull effort with right upper extremity of 35 lb on an occasional basis.

In response to an inquiry from Diamond Shine's insurer, Dr. Westpheling wrote that Kent reached the end of his healing period of November 9, 2006, and had zero percent permanent impairment.

Kent filed a petition in arbitration against Diamond Shine on February 5, 2007, alleging his work-related injuries caused him permanent partial disability and industrial disability. The deputy commissioner set hearings for February 12, 2008, and May 8, 2008, and ordered the parties to complete discovery within sixty days of the hearing.

Kent's attorney referred him to Dr. Roy Miller, an orthopedic surgeon, on July 13, 2007. Dr. Miller examined Kent and reviewed his medical records. In his September 4, 2007 report, he concluded Kent's symptoms were "as they were before the prolotherapy was begun." He diagnosed Kent with degenerative arthritis of the AC joint bilaterally and carpal tunnel syndrome bilaterally, with both ailments presenting more prominently on the right than the left side. He opined the work-related activities aggravated the degenerative arthritis, concurred with Dr. Westpheling's work restrictions, and concluded twelve percent permanent impairment of the right upper extremity and eight percent impairment in the left upper extremity.

In December of 2007 Dr. Miller re-examined Kent, finding ten percent permanent impairments of the right upper extremity and six percent impairment of the left upper extremity. Dr. Miller converted these impairments to six percent and four percent impairments of the whole body, respectively. Dr. Westpheling concurred with these findings in January 2008, but noted Kent had not complained of pain in his left upper extremity on his May 12, 2006 visit. Dr. Fabiano also concurred in Dr. Miller's impairment findings. MRI reports from

February 7, 2008 ordered by Dr. Fabiano showed degenerative arthritic changes in the right shoulder and mild arthritic changes in the left shoulder.

Kent's attorney also referred him to vocational expert Kent Jayne in December 2007. The expert determined Kent's reading and math skills were consistent with students in the late elementary grades. Assessing his physical and mental abilities, Jayne concluded Kent

> does not currently possess the necessary capacities for competitive employment in the labor market . . . he is unable to perform any services except those which are so limited in quantity, dependability, or quality that there is no reasonably stable labor market for them.

On the same day he met with the vocational expert, Kent moved to amend his February 5, 2007 petition to assert the odd-lot doctrine.[2] Kent urged that any prejudice from its delayed filing would be remedied because "Claimant would not object to any additional time Defendants feel they would need to conduct additional depositions and/or a vocational assessment of their own." Diamond Shine resisted the amendment on January 2, 2008, noting that it had yet to receive Jayne's report, and arguing insufficient time to prepare before the February 12, 2008 hearing. The deputy commissioner denied Kent's motion on January 3, 2008.

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[2] Under that doctrine

> a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist."

Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 125 (Iowa 2004).

Diamond Shine retained vocational consultant Steve Mootz. Mootz did not meet with Kent, but provided an opinion on the claimant's condition on February 1, 2008, based on reviewing reports. Mootz recommended Kent avoid mechanical work because it required use of the upper body. Mootz did not rule out work as a bartender or cook; he also believed that despite his injuries, Kent could seek employment with a rental company or as a security guard.

Following the arbitration hearing, the deputy commissioner found Kent sustained a loss of earning capacity of forty percent. The arbitration decision found that neither vocational expert provided "reliable, probative evidence." Both parties appealed the decision to the commissioner.

On March 20, 2009, the commissioner found the deputy's award of forty percent industrial disability failed to take into account the disability to both of Kent's arms, in addition to his shoulders. The commissioner noted that while the reduction in Kent's hourly earnings since his injury was approximately forty percent (from $12 to $7.50 per hour), Kent was not working a full forty hours per week at the time of the arbitration hearing.

The commissioner increased his loss of earning capacity to seventy percent concluding, "[i]t is evident from the record presented that claimant has some residual ability to compete for employment positions in the competitive labor market." He also endorsed the deputy commissioner's refusal to analyze the matter as an odd-lot claim. Following the commissioner's denial of his motion for rehearing, Kent petitioned for judicial review.

The district court remanded the case on February 16, 2010, reasoning the commissioner's decision

> is not sufficiently detailed to enable the court to consider whether there is substantial evidence to support the 70% disability rating, particularly with regard to the finding that Petitioner "has some residual ability to compete for employment positions in the competitive labor market."

The district court asked the agency to determine whether the factors identified by Kent in his judicial review brief and those cited in the case of *Hill v. Fleetguard, Inc.,* 705 N.W.2d 665, 673 (Iowa 2005), support a finding of total disability or a lower disability rating, as argued by Diamond Shine. The court also concluded that "it was arbitrary for the agency to refuse to consider" the odd-lot claim due to its untimely filing fifty-five days before the hearing.

In a remand order issued on July 16, 2010, the commissioner said he was "uncertain of the basis for the district court's uncertainty" and concluded:

> The appeal decision . . . identifies the relevant factors of industrial disability at issue in this matter and thereafter concludes that the factors are evidence that claimant has "some residual ability to compete for employment positions in the competitive labor market." As noted in the appeal decision, claimant has minimal functional impairment and he has work-restrictions that limit some lifting and repetitive pushing and pulling activities. Claimant was not restricted to part-time work and was actually employed by two employers at the time of hearing. Those factual findings support a conclusion that claimant has residual ability to compete for employment positions in the competitive labor market.

In response to the district court's inquiry regarding *Hill*, the commissioner stated:

> The finding of 70 percent industrial loss is in line with the requirements of *Hill* and the numerous prior cases which require a finding of the injured workers' earning capacity following a workplace injury and application of the full responsibility rule.

After noting Kent's addition of the odd-lot claim came five days following the close of discovery, the commissioner applied the doctrine to the instant facts. He determined Kent failed to prove a prima facie case of total disability and that Diamond Shine proved Kent could find employment elsewhere in the community, and therefore Kent was not an odd-lot employee.

The commissioner denied Kent's motion for rehearing, and Kent again appealed to the district court. On June 23, 2011, the court held the commissioner's remand decision regarding the seventy percent industrial disability "was based on an erroneous interpretation and application of law, and the commissioner did not properly apply the industrial disability factors relevant to the assessment of industrial disability." The court applied the *Hill* factors to what it considered to be relevant facts, concluding "it is apparent that a finding of total disability on the part of Petitioner is appropriate." The court also reversed the commissioner's rejection of the odd-lot doctrine, concluding Kent was "entitled to a finding of total disability under the odd-lot analysis." In addition, the court determined the agency erred in refusing Kent's claim for the costs of retaining vocational expert Jayne. Diamond Shine appeals.

II. Scope and Standard of Review

Iowa Code chapter 17A authorizes judicial review of the commissioner's decisions. Iowa Code § 86.26 (2009). When a district court reviews such a decision, it acts in an appellate capacity. *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 571 (Iowa 2006). It may grant relief if the agency has prejudiced the substantial rights of the claimant and if the agency action falls within any

criteria enumerated in section 17A.19(10)(a)–(n). *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010). On review, we apply chapter 17A when determining whether we reach the same conclusions as the district court. *Hill*, 705 N.W.2d at 669. If our conclusions align, we affirm; otherwise we reverse. *Id.*

When a party claims the commissioner's decision is not based upon substantial evidence, the reviewing court must determine if a factual determination made by the commissioner "is not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f). "Merely because we may draw different conclusions from the record does not mean the evidence is insubstantial." *Westling v. Hormel Foods Corp.*, ___ N.W.2d ___, ___ (Iowa 2012). Whether a piece of evidence trumps another or is qualitatively weaker is not an assessment for either the district court or the court of appeals to make when reviewing an agency's decision on the basis of substantial evidence. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394 (Iowa 2007).

III. Analysis

A. Does Substantial Evidence Support the Commissioner's Industrial Disability Determination?

Permanent partial disability is calculated based on an employee's industrial disability. *Hill*, 705 N.W.2d at 673. Industrial disability measures the employee's lost earning capacity, a figure determined by considering several factors. *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 605 (Iowa 2005). In its remand order, the district court instructed the commissioner to contemplate these

factors, which include "the employee's functional impairment, age, education, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining to the extent any of these factors affect the employee's prospects for relocation in the job market." *See Hill*, 705 N.W.2d at 673. When the combination of these factors prevents an employee from securing regular employment to earn a living, even if the employee sustained only partial functional disability, he experiences total industrial disability. *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 103 (Iowa 1985).

Both of the commissioner's rulings address the *Hill* factors. In response to the district court's remand order, the commissioner quoted the findings he made in his initial appeal order:

> Claimant was 51 years old at the time of the hearing. He had a high school diploma, but tested at only the sixth grade level for word-reading. He has sustained permanent impairment of 6 percent of the whole body for the right upper extremity and 4 percent of the whole body for the left upper extremity. Claimant has significant restrictions which the employer's representative acknowledged would preclude his return to employment with the employer.

The commissioner then recited the weight-lifting and repetitive motion restrictions imposed by the medical care providers. His order continued:

> Despite their inability to return claimant to employment, defendants have not provided claimant with any vocational assistance to assist him in securing full-time, as opposed to part-time employment. It is evident from the record presented that claimant has some residual ability to compete for employment positions in the competitive labor market.

The question before us is whether substantial evidence backed the commissioner's finding that Kent retained "some residual ability to compete for

employment positions in the competitive labor market." Our job is to broadly and liberally apply the commissioner's findings to uphold rather than defeat the decision of the agency. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000). The commissioner must state the evidence and detail the reasons justifying its conclusions. *Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 356 (Iowa 1999). This condition is met if a court can determine with reasonable certainty the facts relied upon to justify the commissioner's conclusions. *Id.* Courts do not expect an administrative agency to specifically mention all evidence used in reaching its decision. *Id.*

At the outset of his initial ruling, the commissioner incorporated much of the deputy commissioner's arbitration decision: "The findings of fact and conclusions of law contained in the arbitration decision are affirmed and adopted as final agency action with the following modifications . . . ." The deputy commissioner provided extensive factual background, detailing reports and testimony from the doctors, vocational experts, and the parties involved. The commissioner approved the arbitration decision, describing it as well-reasoned and supported by the record. It is true that "the deputy industrial commissioner's proposed findings are not in consideration on judicial review." *Id.* at 356. But because the commissioner affirmed and adopted the deputy commissioner's factual findings and legal conclusions, with certain modifications on appeal, the approved portion of the arbitration decision can be viewed as final agency action. *See Arrow-Acme Corp. v. Bellamy*, 500 N.W.2d 92, 94 (Iowa Ct. App. 1993).

When we look to the *Hill* factors, we can pinpoint evidence in the record that would permit the decision maker to conclude that Kent suffered either a partial or a total industrial disability. For example, the agency found it significant that Kent held down two part-time jobs at the time of the hearing. The district court emphasized that at fifty-five years of age, Kent had "little chance of competing with younger workers" for the jobs identified by the vocational expert Mootz. We are mindful that "[j]ust 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." *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 337 (Iowa 2008); *see also IBP, Inc. v. Harpole*, 621 N.W.2d 410, 418 (Iowa 2001) (applying the proposition in the context of contradictory medical evidence presented).

The deputy commissioner found both vocational experts "predictably opined" in favor of the party offering their testimony. Accordingly, the arbitration decision expressed a plague-on-both-your-houses view of their credibility, concluding "[t]he opinions of neither Mr. Jayne nor Mr. Mootz offer reliable, probative evidence." As the front-line fact finder, the deputy commissioner has the duty to assess the witnesses' truthfulness and weigh the evidence in conjunction with other circumstances disclosed on the record. *Dunlavey v. Economy Fire & Gas Co.*, 526 N.W.2d 845, 853 (Iowa 1995). Given his skepticism about the vocational experts' credibility, the deputy commissioner relied on the doctors' impairment ratings and the circumstance that Kent continued to work as a part-time bartender, "a type of work he did in his own

business before he worked for Diamond Shine." The deputy commissioner calculated that the relevant factors resulted in a finding Kent suffered an industrial disability of forty percent. The commissioner found that measure in error and assigned a seventy percent loss of earning capacity.

When assessing industrial disability, the commissioner must consider all factors bearing on Kent's actual employability. *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 857 (Iowa 2009). In this case, the commissioner and deputy commissioner both addressed the factors affecting the industrial disability determination and explained their reasoning. It is not our prerogative to reweigh the evidence. *Arndt*, 728 N.W.2d at 394. The commissioner relied on Dr. Miller's opinion that Kent's permanent impairment should be quantified as six percent of the whole body related to the injury of his right upper extremity and four percent of the whole body for the left upper extremity. The commissioner also noted that despite his lifting and movement restrictions, Kent was able to work in part-time bartending positions. Although reasonable minds could differ when measuring the extent of Kent's industrial disability, we find substantial evidence to undergird the agency's decision. *See Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 501 (Iowa 2003) ("The fact that different inferences could be drawn from the same record does not diminish the soundness of the deputy commissioner's findings and conclusions when that record is viewed as a whole." (internal quotations omitted)).

B. Does Substantial Evidence Support the Commissioner's Finding that Kent Was Not an Odd-Lot Employee?

Diamond Shine first urges that the agency was right in finding Kent missed the deadline for raising the odd-lot issue. Without endorsing the district court's conclusion that the agency acted arbitrarily in refusing to consider the claim based on its untimely filing, we opt to reach the merits of Kent's odd-lot argument.

A worker falls within the definition of an odd-lot employee when his injury leaves him incapable of securing employment in any well-known branch of the labor field. *Guyton*, 373 N.W.2d at 105 (formally adopting odd-lot doctrine). If an individual is able to perform only those services "so limited in quality, dependability or quantity that a reasonably stable market for them does not exist," courts will consider the odd-lot worker to be totally disabled. *Id.* Underlying this doctrine is the rationale that if an individual has no reasonable prospect of steady employment, then the worker will have no material earning capacity. *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 267 (Iowa 1995). An odd-lot designation depends upon a combination of factors, such as intelligence, education, training, age, physical impairment, and ability to be retrained. *Id.* at 268.

The odd-lot doctrine involves a shifting burden test. The worker must first make a prima facie case that he is totally disabled by showing he is not employable in the competitive labor market. *Hainey v. Protein Blenders, Inc.*, 445 N.W.2d 398, 400 (Iowa Ct. App. 1989). The worker must produce

substantial evidence to prove he is unemployable, which can be accomplished by demonstrating the worker's reasonable effort to obtain employment in his area. *Guyton*, 373 N.W.2d at 106. Once the worker shows he cannot compete in the labor market, the burden shifts to the employer to produce evidence of suitable employment. *Hainey*, 445 N.W.2d at 400. "If the employer fails to produce evidence that jobs are available for the worker, the commissioner shall enter a finding of total disability." *Guyton*, 373 N.W.2d at 106. In effect, once the worker carries his burden, "we presume that no jobs are available unless the employer introduces evidence of such work." *Nelson*, 544 N.W.2d at 267 (recognizing the ultimate burden of persuasion regarding the issue of industrial disability remains on the employee).

On remand, the commissioner held Kent failed to make a prima facie showing he fit into the odd-lot category. Kent relied upon the opinion of vocational expert Jayne that Kent couldn't work full-time, that his poor test scores limited his ability to return to a competitive labor market, and that his increasing pain issues would affect any sedentary employment found. The commissioner was not persuaded by this evidence, noting "Mr. Jayne's opinions were not found to be supported by the factual findings that support the conclusion that claimant has residual earning capacity in the competitive labor market."

The commissioner instead relied on vocational consultant Mootz's opinion that positions were available in the competitive labor market that would fit Kent's work restrictions. Mootz suggested Kent could work at a car rental company or as a security guard, or could continue to work as a bartender or cook, positions

he has held in the past. Kent testified that he could work as a forklift operator or perform light cleaning and tractor work. The commissioner was disinclined to label Kent as an odd-lot employee when he was already working as a bartender, albeit in a part-time capacity.

The district court reversed the agency, saying the commissioner "erred in his interpretation of law regarding [Kent's] odd-lot claim." But the court's underlying analysis did not expose legal error. Instead the judicial review order gave credence to Jayne's opinion that no market existed for Kent's limited skills and discounted Mootz's report identifying potential jobs that he could do. The district court stepped outside its role by substituting its own credibility finding for that of the commissioner. The conflicting views of the two vocational experts do not permit us to reject the agency's fact finding if it is supported by substantial evidence. *See Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). Because the commissioner's rejection of the odd-lot doctrine was supported by substantial evidence, it should not have been disturbed.

C. Was Kent Entitled to Recover the Cost of His Vocational Rehabilitation Expert?

In the course of discovery, Kent propounded requests for admissions to the employer. Diamond Shine admitted Kent sustained a cumulative trauma to the right shoulder arising out of and in the course of his employment, and Kent's permanent restrictions, as ordered by Dr. Westpheling, were related to the work injury. But Diamond Shine denied Kent's injury "should be compensated under Iowa Code § 85.34(2)(u)."

This denial prompted Kent to seek an order requiring Diamond Shine pay $4588.50—the cost of consultant Jayne's vocational assessment pursuant to Iowa Rule of Civil Procedure 1.517(3).[3] The deputy commissioner denied the request, reasoning:

> First, based on the stipulations at the hearing the defendants admitted the nature of claimant's disability was an industrial disability or an unscheduled disability. Mr. Jayne offered an opinion on the extent of claimant's disability. Mr. Jayne offered no opinion on the nature of claimant's disability which was the question asked in the request for admissions. Mr. Jayne is not qualified to give an opinion on the nature of claimant's disability. Mr. Jayne's reports did not prove claimant was permanently and totally disabled.
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> The arbitration decision went on to say:
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> Claimant's attempts to gain payment of Mr. Jayne's reports may be a back door attempt to avoid the limitation of the costs [of] experts' reports under rule 4.33. For all these reasons, claimant is not entitled to the costs of Mr. Jayne's reports, other than $150.00 allowable under rule 876 IAC 4.33.

The commissioner affirmed the deputy commissioner's denial of these expenses. The district court found the agency erred in refusing Kent's claim for costs:

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[3] This rule states:

> *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 1.510, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds any of the following:
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> a. The request was held objectionable pursuant to rule 1.510.
> b. The admission sought was of no substantial importance.
> c. The party failing to admit had reasonable grounds to believe that the party might prevail on the matter.
> d. There was other good reason for the failure to admit.

Iowa R. Civ. P. 1.517(3).

> Respondents' refusal to pay benefits until approximately a week before the arbitration hearing, despite Respondents' knowledge of Petitioner's permanent restrictions, led to Petitioner acquiring the services of Mr. Jayne to substantiate industrial disability. Mr. Jayne's report provides proof of industrial disability, and Petitioner is entitled to the expenses he incurred as a result of obtaining Mr. Jayne's services, pursuant to Rule 1.517(3).

On appeal, Diamond Shine embraces the reasoning of the deputy commissioner that Jayne's opinion related to the extent of the disability, not to its nature. The employer also argues that because the admission sought was of no substantial importance, the award would be improper.

The imposition of discovery sanctions is discretionary and the refusal to impose such sanctions will not be reversed unless the fact finder has abused its discretion. *See Sandhorst v. Mauk's Transfer, Inc.,* 252 N.W.2d 393, 399 (Iowa 1977). Even if matters previously denied are ultimately determined to be true, this does not necessarily mean a party's denial was unreasonable. *Koegel v. R Motors, Inc.*, 448 N.W.2d 452, 456 (Iowa 1989).

We find that the costs of retaining consultant Jayne were not "reasonable expenses incurred" in proving the truth of matter at the heart of the request for admissions. Before hiring Jayne, Kent possessed sufficient medical evidence to prove his injury should be compensated. Drs. Miller, Westpheling, Kim, and Fabiano provided evaluations substantiating that a work-related injury disabled Kent to some extent. Dr. Westpheling's work restrictions showed the injury's lasting effects inhibited Kent's present and future ability to work. Although Jayne's report may have provided guidance to assess Kent's overall entitlement,

it duplicated evidence already available to address whether Kent's injury "should be compensated under Iowa Code § 85.34(2)(u)."

If Kent's intent in retaining Jayne was to rebut Diamond Shine's denial of Kent's request for admission, the costs of Jayne's services cannot be considered reasonable expenses, given the proof already available to prove the compensable nature of Kent's injuries. We find it more likely that Kent hired Jayne to prove additional issues in the case—such as Kent's odd-lot claim and his ability to gain future employment—and not to prove Kent's threshold claim that he was entitled to relief under section 85.34(2)(u). Jayne's reliance on previously disclosed medical evidence to gauge the extent of Kent's disability reinforces our perspective. The commissioner did not abuse his discretion in refusing to grant Kent's request that Diamond Shine pay Jayne's fees.

REVERSED.