IN THE COURT OF APPEALS OF IOWA

No. 3-913 / 13-0366
No. 3-1071 / 13-0721
Filed January 9, 2014

WAL-MART STORES and
AMERICAN HOME ASSURANCE,
Petitioners-Appellants,

vs.

JULIE HENLE,
Respondent-Appellee.

Appeals from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Employer appeals a judgment under Iowa Code section 86.42 (2011) and the judicial review decision granting permanent total disability benefits. **AFFIRMED.**

Peter M. Sand, Des Moines, for appellants.

Peter Leehey and Anthony J. Olson of Pete Leehay Law Firm, P.C., Cedar Rapids, for appellee.

Heard by Doyle, P.J., and Tabor and Bower, JJ.

TABOR, J.

In this decision we address two consolidated appeals challenging the award of permanent total disability benefits to Julie Henle. In the first appeal, Wal-Mart contests the district court's entry of judgment under Iowa Code section 86.42 (2011) and its refusal to grant a stay of execution or enforcement of the commissioner's award of benefits during the pendency of the judicial review. In the second appeal, Wal-Mart seeks to reverse the judicial review order affirming the workers' compensation commissioner.

Because the district court properly entered judgment under section 86.42, and substantial evidence supported the award of permanent total disability benefits, we affirm both appeals.

I. Background Proceedings and Facts

Julie Henle worked in the inventory department of the Marshalltown Wal-Mart Store. On May 30, 2006, she was injured when a sixty-pound stack of plastic totes fell approximately fifteen feet striking her on the head and left shoulder, knocking her to the floor. She received treatment in the hospital emergency room for contusions, abrasions, and lacerations over her eye and left temple. The injury has caused her unremitting headaches and dizziness.

Joseph Pollpeter, M.D., saw Henle following her visit to the emergency room. He noted her continued dizziness and restricted her from driving. He also found she had trouble concentrating and any motion caused her discomfort. Dr. Pollpeter saw Henle again in July 2006. Henle continued to suffer headaches, sensitivity to light, and occasional nausea. The doctor restricted Henle to lifting

twenty pounds, working four hours per day, and no climbing. Henle saw a physical therapist to help alleviate some of her symptoms. On September 13, 2006, Dr. Pollpeter changed the lifting restrictions to forty pounds with no climbing. He also cleared her to work a maximum of five hours per day. Henle continued to see Dr. Pollpeter, but her symptoms did not improve. Dr. Pollpeter believed Henle was in constant pain and not malingering.

At Wal-Mart's request, Henle saw neurologist Michael Jacoby in February 2009. Dr. Jacoby noted nothing had changed in her symptoms since he last saw her in 2008. He opined she should be treated by a chronic pain specialist. Dr. Jacoby reported in May 2010 he had no other treatments to offer Henle and she should continue to follow up with her treating physicians.

Henle also began seeing Ana Recober, M.D. in July 2007. Dr. Recober found Henle to be suffering from chronic post-traumatic head pain. She recommended Henle see Dr. Amy Stockman for psychological therapy for chronic pain syndrome. Dr. Recober also treated Henle with a variety of medications including Botox, but none of them improved Henle's condition. In a letter to Dr. Pollpeter on May 10, 2010, Dr. Recober opined that Henle had reached her maximum medical improvement. In June 2010, Henle was diagnosed with mood disorders secondary to her chronic headaches.

Marc Hines, M.D. performed an independent medical evaluation (IME) on November 19, 2010. Dr. Hines found Henle suffered a forty-one percent impairment of the whole person. He found Henle's problems were "permanent in the sense that [he could] give no anticipated date of their resolution." He

provided his opinion as to future medical treatments and continued treatment by a chronic pain specialist.

Henle returned to her position at Wal-Mart after the injury, but was restricted to four-hour days. She continued as a full-time employee, and received partial disability benefits. Henle took two leaves of absence from Wal-Mart for personal medical reasons not related to the work injury and eventually the employer transferred her to a different department. Henle often missed work because of her headaches. Wal-Mart has treated her headache-related sick days as excused absences, which was an exception to the company's usual attendance policy.

On January 10, 2011, a deputy workers' compensation commissioner held an arbitration hearing in regard to disability benefits. After reviewing the evidence before her, the deputy concluded Henle was "permanently and totally disabled from competitive employment." The deputy ordered permanent total disability payments beginning from May 30, 2006, "but for those dates when the employer has provided claimant was [sic] accommodated employment." The deputy ordered the accrued payments to be made in a lump sum and Wal-Mart to receive credit for past payments made. The deputy also ordered Wal-Mart to pay for the IME performed by Dr. Hines.

Wal-Mart appealed to the Worker's Compensation Commissioner. On April 11, 2012, the commissioner issued his appeal decision affirming and adopting the arbitration decision as final. Wal-Mart filed for judicial review of the appeal decision on May 9, 2012.

On August 16, 2012, Henle moved for entry of judgment under Iowa Code section 86.42. On August 24, 2012, Wal-Mart filed a resistance to the motion for judgment, arguing that while entry of judgment on the commissioner's award was a ministerial function, determining the amount of the judgment to be entered required discretion on the part of the district court. Wal-Mart asserted "no amount can currently be entered in judgment on this award, because nothing is presently owing, even if it is upheld on judicial review."

On December 14, 2012, while Henle's motion for judgment was still pending, the district court held a hearing on Wal-Mart's petition for judicial review. Then on February 18, 2013, the district court denied Wal-Mart's request for a stay and granted Henle's request to reduce the award to judgment. The court entered judgment on March 7, 2013, and that same day Wal-Mart filed an appeal and posted a supersedeas bond. That appeal proceeded as Iowa Supreme Court No. 13-0366.

On April 10, 2013, the district court issued its judicial review order, finding the commissioner's award of permanent total disability was supported by substantial evidence and legally correct. The court agreed with Wal-Mart's challenge to the IME fee and remanded that matter to the commissioner for "explicit factual findings." Wal-Mart filed a notice of appeal from the judicial review order on May 2, 2013. That appeal proceeded as No. 13-0721.

The supreme court transferred both cases to our court. During oral argument on the challenge to the judicial review order, both parties agreed the two appeals could be consolidated for decision.

II. Scope and Standards of Review

We review the district court's entry of judgment on the workers' compensation award for legal errors. Iowa R. App. P. 6.907; *Grinnell Coll. v. Osborn*, 751 N.W.2d 396, 398 (Iowa 2008). The issuance of a stay is discretionary under Iowa Code section 17A.19(5). *Osborn*, 751 N.W.2d at 398. Accordingly, if we were to reach the merits of the district court's denial of Wal-Mart's request for a stay, we would review the ruling for an abuse of discretion. *See id*.

Judicial review of a workers' compensation decision is governed by chapter 17A. *See* Iowa Code § 86.26. When a district court reviews the commissioner's decision, it acts in an appellate capacity. *Dunlap v. Action Warehouse*, 824 N.W.2d 545, 554 (Iowa Ct. App. 2012). The district court may grant relief when the agency action falls within any criteria enumerated in section 17A.19(10)(a)–(n). *Id*. On review, we apply chapter 17A in deciding whether we reach the same conclusions as the district court. *Id*. If our conclusions align, we affirm; otherwise we reverse. *Id.*

Wal-Mart initially asks our court to consider the effect *Burton v. Hilltop Care Center*, 813 N.W.2d 250 (Iowa 2012), has on this case. In *Burton*, our supreme court emphasized the need to categorize the nature of each statement included in an agency decision to unravel the "interwoven tapestry of findings of fact, application of law to fact, and interpretations of law." The *Burton* court cautioned: "Combining all three elements of agency decision making in such a

condensed, tangled manner makes for inefficient and ineffective judicial review of agency action." 813 N.W.2d at 260.

Wal-Mart argues the agency's decision suffers from the "interwoven tapestry" problem discussed in *Burton* because the deputy did not single out what evidence is superior to other evidence when reaching her decision. *Burton* was not concerned with the relative strength of various pieces of evidence, but rather the intermingling of findings of fact, conclusions of law, and application of law to facts. We see no *Burton* problem in this case. When a court conducts a substantial evidence review, we are not charged with assessing if any evidence "trumps" other evidence. *See Arndt v. City of Le Claire*, 728 N.W.2d 389, 395 (Iowa 2007). While the agency decision must be "sufficiently detailed to show the path . . . taken through conflicting evidence," the law does not require the commissioner to discuss each and every fact in the record and explain why or why not he has rejected it." *Terwilliger v. Snap–On Tools Corp.*, 529 N.W.2d 267, 274 (Iowa 1995). "Such a requirement would be unnecessary and burdensome." *Id*.

Our decision is controlled in large part by the deference we extend the workers' compensation commissioner. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 844–845 (Iowa 2011). We will only disturb the commissioner's finding of permanent total disability if it is not supported by substantial evidence, as that term is defined in the Administrative Procedure Act, Iowa Code section 17A.19(10)(f)(1): "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."

We will not find evidence insubstantial solely because we may draw different inferences than the commissioner. *See Pease*, 807 N.W.2d 845. We are not called to decide if the evidence also supports a different finding, just if it supports the findings actually made. *Id.*

An industrial disability determination involves the application of law to fact, which we will not overturn unless it is "irrational, illogical, or wholly unjustifiable." *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 856–57 (Iowa 2009). The proper interpretation of the workers' compensation statutes is a question of law for the appellate courts. *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996).

III. Analysis

Workers' compensation cases involving both section 86.42 and judicial-review proceedings result in two judgments—one that provides a vehicle for collection of the workers' compensation award and another that resolves the issues decided by the commissioner. *Rethamel v. Havey*, 679 N.W.2d 626, 628 (Iowa 2004) (*Rethamel I*). Both judgments for Henle are at issue in this consolidated appeal. We will first address Wal-Mart's complaints regarding the district court's entry of judgment under section 86.42. We will then turn to the employer's arguments concerning the judicial review order.

A. Did the district court properly enter judgment under section 86.42 without granting a stay of execution or enforcement of the commissioner's award of benefits during the pendency of the judicial review?

Section 86.42 allows a party to transform a workers' compensation award into an enforceable judgment. *Zeigler v. Fleetguard, Inc.*, 675 N.W.2d 581, 583 (Iowa 2004). The statute reads as follows:

> Any party in interest may present a file-stamped copy of an order or decision of the commissioner, from which a timely petition for judicial review has not been filed or if judicial review has been filed, which has not had execution or enforcement stayed as provided in section 17A.19, subsection 5, . . . and all papers in connection therewith, to the district court where judicial review of the agency action may be commenced. The court shall render a decree or judgment and cause the clerk to notify the parties. The decree or judgment, in the absence of a petition for judicial review or if judicial review has been commenced, in the absence of a stay of execution or enforcement of the decision or order of the workers' compensation commissioner, . . . has the same effect and in all proceedings in relation thereto is the same as though rendered in a suit duly heard and determined by the court.

Iowa Code § 86.42.

Wal-Mart contends the district court improperly entered judgment under section 86.42 and mistakenly refused to grant a stay of execution or stay of enforcement of the commissioner's award of benefits during the pendency of the judicial review. Wal-Mart asserts that under the wording of the deputy's arbitration ruling, affirmed by the commissioner, it did not owe any past weeks of permanent total disability benefits to Henle.

Here is the language at issue:

> THEREFORE, IT IS ORDERED THAT:

> Defendants pay claimant permanent and total disability benefits at the applicable rate of three hundred and thirty-seven and 62/100 dollars ($337.62), commencing on May 30, 2006, and payable so long as she remains permanently and totally disabled, but for those dates when the employer has provided claimant was [sic] accommodated employment.

Wal-Mart interprets this passage as requiring it to pay $337.62 per week *only* for the weeks when it did not offer Henle part-time employment. Because the employer "consistently and continuously offer[ed] accommodated work to [Henle] for several years as of the time of trial," Wal-Mart insists it did not owe the $49,630.14 in past permanent total disability benefits reduced to a judgment by the district court.

As our first order of business, we must decide whether Wal-Mart properly preserved error on this claim. Henle argues on appeal that Wal-Mart failed to preserve error on the question whether "it is entitled to withhold payment of permanent total disability benefits while Henle remains employed at reduced hours" because it raised that claim for the first time in response to her motion for judgment. We are not convinced Wal-Mart had the opportunity to raise that issue earlier. Wal-Mart did pursue an intra-agency appeal, asking the commissioner to reverse the deputy's order and asserting the evidence did not support an award of total disability, in part because Henle was "gainfully employed" by Wal-Mart. Because Wal-Mart read the deputy's ruling as not requiring payment of back benefits for the weeks it had accommodated Henle, the employer could not be expected to challenge that part of the deputy's order.

Henle next claims Wal-Mart missed its opportunity to preserve error by not filing a motion under Iowa Rule of Civil Procedure 1.904(2) when the district court

failed to address the construction of the award when it granted Henle's motion for judgment under section 86.42 on February 18, 2013. In granting Henle's request for judgment, the court cited *Rethamel I* and *Rethamel v. Havey*, 715 N.W.2d 263 (Iowa 2006) (*Rethamel II)*. Wal-Mart relied on those two cases to argue at the August 16, 2013 hearing that the court could not construe the agency's award as requiring the entry of judgment for any back benefits. The district court obviously rejected Wal-Mart's argument when it directed Henle's counsel to prepare an updated proposed judgment entry. When the judgment entered on March 7, 2013, included 147 weeks of back permanent total disability benefits, Wal-Mart filed an appeal. Under these circumstances, we do not believe Wal-Mart was required to file a rule 1.904(2) motion to preserve error. *See Lamasters v. State*, 821 N.W.2d 856, 863-64 (Iowa 2012).

Turning to the merits of Wal-Mart's claim, we find no error in the district court's act of entering judgment under section 86.42. As Wal-Mart acknowledges, section 86.42 assigns the court only a ministerial role, limited to entering a judgment in conformance with the agency's award. *See Osborn*, 751 N.W.2d at 400. In *Rethamel I*, our supreme court held section 86.42 did not grant the court power to review, reverse, change or modify the award, or even to remand the case to the commissioner. 679 N.W.2d at 628. The only liberty the court could take under the judgment statute was to "construe" the award. *Id*. In *Rethamel II*, our supreme court defined "construe" as the ability to analyze or explain the meaning of a sentence or passage. 715 N.W.2d at 266.

Wal-Mart claims the district court improperly construed the agency's award, overlooking the "but for" language of the agency ruling—which the employer reads as exempting all weeks when Wal-Mart provided work to accommodate Henle's disability. Wal-Mart also argues the judgment erroneously ordered future payments.

In response, Henle asserts the judgment should be affirmed because the district court was required to enter judgment in conformity with the agency award and the award mandated payment of back and future benefits. She suggests the deputy commissioner's but-for language was intended to reflect the requirement under Iowa Code section 85.34 that any temporary total disability or temporary partial benefits be deducted from the permanent total disability benefits, and was not intended to obliterate the award in full.

We find logic in Henle's assertion. It may be the district court went too far by filling in dollar amounts not referenced by the agency. *See Rethamel II*, 715 N.W.2d at 267 (suggesting appropriate way to "construe" award would be to generically say "Rethamel is liable for Harvey's medical expenses."). But Wal-Mart is not complaining about the judgment's specificity. The employer takes the extreme position that it owed nothing and the district court could not enter a judgment of zero dollars. We reject that position and find the district court properly reduced Henle's award to a judgment under section 86.42.

We also consider Wal-Mart's argument that the portion of the judgment awarding the IME fee should be vacated because the district court remanded that issue to the agency in its judicial review order. We find any modification of the

fee award following the remand to the agency would be best handled under Iowa Code section 86.43.[1] *See Zeigler*, 675 N.W.2d at 584.

In its appeal of the section 86.42 judgment, Wal-Mart also challenged the district court's denial of its request to temporarily stay execution of the judgment until the judicial review was complete. The court denied that request. Wal-Mart acknowledges in its brief that the denial of a temporary stay may be a moot issue, but alleges it is capable of repetition yet evading review. Our supreme court detailed the standard for granting a stay in *Osborn*, 751 N.W.2d at 397. Accordingly, we see no need to review the stay ruling here.

B. Did the commissioner's finding of permanent total disability constitute legal error given Henle's continued ability to earn wages, albeit in an accommodated position with Wal-Mart?

Wal-Mart raises two issues in the judicial review appeal. First, the employer claims neither the medical evidence nor the non-medical evidence supports the agency determination of permanent total disability. Second, Wal-Mart contends Henle is not entitled to permanent total disability benefits because thanks to its accommodation she has been employed and earning wages. We will address these claims in reverse order.

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[1]"Upon the presentation to the court of a file-stamped copy of a decision of the workers' compensation commissioner, ending, diminishing, or increasing the compensation under the provisions of this chapter, the court shall revoke or modify the decree or judgment to conform to such decision." Iowa Code § 86.43.

1. Effect of accommodated work on industrial disability rating

Industrial disability is determined by evaluating the employee's earning capacity. *Pease*, 807 N.W.2d at 852. We do not focus on Henle's disability, but on her ability to obtain gainful employment. *See Second Injury Fund v. Nelson*, 544 N.W.2d 258, 264 (Iowa 1995).

Wal-Mart contends the commissioner could not properly conclude Henle was totally disabled when she was employed and earning wages. Wal-Mart invites us to "synthesize" three Iowa Supreme Court cases: *Murillo v. Black Hawk Foundry*, 571 N.W.2d 16 (Iowa 1997); *Quaker Oats v. Chia*, 552 N.W.2d 143 (Iowa 1996); and *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614 (Iowa 1995). Wal-Mart contends we should glean from that case law an obligation on the part of the commissioner to consider evidence of Henle's continued employment as proof she had some level of earning capacity.

Our reading of those three cases does not lead to the conclusion urged by Wal-Mart. An employer's accommodation of an injured employee—like Henle's part-time job and excused sick days—may only be factored into an industrial disability award if the commissioner finds a position equivalent to the newly created job is available in the competitive labor market. *See Murillo*, 571 N.W.2d at 18; *Ciha*, 552 N.W.2d at 157–58; *Thilges*, 528 N.W.2d at 617 (Iowa 1995).

In *Thilges*, an injured employee appealed a twenty-five percent disability finding, arguing the commissioner failed to consider future loss of earning capacity. 528 N.W.2d at 616. In that case the court was "satisfied that the commissioner was correct in viewing loss of earning capacity in terms of the

injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer." *Id*. at 617.

In *Ciha*, an employer appealed the commissioner's award of eighty percent industrial disability to a quadriplegic worker, arguing the employee deserved a lesser disability rating because its accommodation had prevented the employee from suffering a loss of earnings. 552 N.W.2d at 157. The supreme court rejected that argument saying efforts to accommodate an employee are not determinative in setting an employee's industrial disability rating. *Id*.

In *Murillo*, the worker injured his back while working as a welder for Blackhawk Foundry. 571 N.W.2d at 17. The employer accommodated Murillo by providing him light work that he could do for longer hours. The question on appeal was whether the severity of his industrial disability was mitigated by the fact his employer fully accommodated his work restrictions. The supreme court explained *Thilges* and *Ciha* stand for the proposition that the commissioner should not be influenced by the mere fact that an employer has found a place to use the skills of an injured worker. *Id*. at 18. The court continued:

> What *Thilges* and *Ciha* did not decide is whether the industrial commissioner could consider whether the newly-furnished job—and the injured worker's ability to function in it—cast light on the injured worker's ability to earn a living in the market place. The worker's ability to function in some new jobs might cast light on that question. The ability to function in other jobs might not cast new light on that question. The transferability of the worker's skills is a factual question to be decided by the commissioner, but it must be based on evidence of wages available from those skills in the open market.

Id.

The *Murrillo* court further stated "the proper rule should be that an employer's special accommodation for an injured worker can be factored into the award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity." *Id*. The new job must be more than "make work" provided by the employer; the same work must be available to the injured worker in the competitive market. *Id.*

Wal-Mart complains *Murrillo* did not take into account the facts in *Ciha*, specifically the commissioner's view that the quadriplegic claimant would have been considered totally disabled without the accommodation by Quaker Oats but awarded only eighty percent industrial disability. *See Ciha*, 552 N.W.2d at 158. The point Wal-Mart tries to tease out of *Ciha* was not at issue on appeal. The worker did not challenge why the commissioner awarded only eighty percent industrial disability when without the accommodation his loss of earnings would have been complete. Rather, Quaker Oats asserted Ciha was only fifty to sixty percent disabled because it had gone to "great lengths" to accommodate him and he suffered no loss of earnings in his accommodated position. *Id*. at 157. Accordingly, the holding of *Ciha* does not advance Wal-Mart's position.

More broadly, Wal-Mart asks the appellate court to revisit *Thilges, Ciha*, and *Murillo*. We recognize Wal-Mart recommended the supreme court retain this case. But the court transferred the appeal to us. As the intermediate appellate court we are not at liberty to overturn supreme court precedent. *See Figley v. W.S. Indus.*, 801 N.W.2d 602, 608 (Iowa Ct. App. 2011); *State v. Hastings*, 466 N.W.2d 497, 700 (Iowa Ct. App. 1990).

Wal-Mart also appears to argue an employee must suffer from one-hundred percent impairment to qualify for total disability. This is incorrect. *See Diederich v. Tri-City Ry. Co. of Iowa*, 258 N.W. 899, 902 (Iowa 1935) (finding twenty-five percent disability constitutes total industrial disability from the standpoint the worker was unable to return to his previous position). Industrial disability does not require a state of absolute helplessness. *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 219 (Iowa 2004), *abrogated on other grounds by Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387 (Iowa 2009). The pertinent question is whether jobs exist in the community for which the injured employee can realistically compete. *Id*. The commissioner found the type of accommodations needed for Henle to work at Wal-Mart are not available in the general labor market. The record showed Henle required a significant reduction in hours and regularly missed shifts due to the severity of her headaches, making it difficult to work even half time. Accordingly, the commissioner abided by the existing precedent in reaching an award of permanent total disability.

2. Substantial evidence for award of permanent total disability

Wal-Mart contends Henle's personal assertion that her headaches prevent her from competing in the job market does not constitute substantial evidence of permanent total disability. Wal-Mart also argues the doctors' opinions do not a carry the burden of proof to support the commissioner's finding.

Substantial evidence is "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue. . . ." Iowa Code § 17A.19(10)(f)(1). Evidence is substantial if a

reasonable mind would accept it as adequate to reach the same conclusion. *Asmus v. Waterloo Cmty. Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). The ultimate question is not whether the evidence might support a different finding, but whether it supports the findings actually made. *Grant v. Iowa Dep't of Human Servs.*, 722 N.W.2d 169, 173 (2006).

The following factors drive a determination of industrial disability: the injured employee's age; education; qualifications; experience, and her inability, because of the injury, to engage in employment for which she is capable. *See McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 192 (Iowa 1980). No guidelines impose a specific weight to be given each factor in the commissioner's consideration; rather the commissioner must "draw upon prior experience and general and specialized knowledge to make a finding in regard to the degree of industrial disability." *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 68 (Iowa Ct. App. 1991).

Henle is fifty-years-old and has a completed her GED. Most of her work history has been in manual labor. Wal-Mart hired her in 2003 as an inventory control specialist. That position required a significant amount of physical labor, including unloading delivery trucks, climbing ladders to stock shelves, and driving forklifts.

The agency reviewed Henle's medical history, the opinions of her physicians, including Dr. Hines, the impairment caused by the injury, and her chance for future medical improvement. The doctors' opinions did not question the connection between the workplace injury and her debilitating condition. Dr.

Pollpeter restricted her to less than four hours of work per day and noted her headaches would get worse if she worked for longer periods of time. Dr. Hines restricted Henle from working on ladders, at heights, and limited her exposure to extreme temperatures or vibrations. Dr. Hines also agreed Henle was unable to work a normal eight-hour day or forty-hour week. Dr. Recober reported Henle may have reached her maximum recovery level and no current medications had been successful in limiting her headache pain. The commissioner found Henle would need significant accommodations to maintain employment and such accommodations were not readily available in the competitive labor market.

Upon review of the record, we agree. Henle's accommodated work situation is not generally available in the marketplace. Henle suffered between twenty-five percent and forty-one percent impairment and she is not allowed to work at elevation or on ladders. These limitations would preclude her from working in an inventory department. Her restricted hours and frequent absences make it highly unlikely she would find a job in a field for which she was qualified that allows her the needed flexibility. In fact, Wal-Mart's own attendance policy does not allow for such accommodation and would result in termination if not for the employer's appreciation of Henle's good work over the years. Although we commend the Marshalltown Wal-Mart for its accommodation of Henle's disability, its efforts do not undermine her disability rating. Substantial evidence supports the commissioner's award of permanent total disability benefits.

AFFIRMED.