IN THE COURT OF APPEALS OF IOWA

No. 6-156 / 05-0699
Filed May 10, 2006

RAY DEAN MOFFETT,
Petitioner-Appellant/Cross-Appellee,

vs.

COLLISION CENTER, INC., and
UNITED FIRE GROUP,
Respondents-Appellees/Cross-Appellant.

Appeal from the Iowa District Court for Des Moines County, Cynthia H. Danielson, Judge.

Ray Moffett appeals, and Collision Center, Inc. and United Fire Group cross-appeal from the district court's judicial review affirmance of the commissioner's industrial disability decision. **AFFIRMED.**

Toby J. Gordon of Schulte, Hahn, Swanson, Engler & Gordon, Burlington, for appellant.

Chris Scheldrup and Charles A. Blades of Scheldrup Law Firm, P.C., Cedar Rapids, for appellee.

Heard by Mahan, P.J., and Hecht and Eisenhauer, JJ.

HECHT, J.

Ray Moffett appeals, and Collision Center, Inc. and United Fire Group cross-appeal from the district court's judicial review affirmance of the commissioner's industrial disability decision. We affirm.

I. Background Facts and Proceedings.

Ray Moffett worked for Collision Center, Inc. for thirty-three years, and excluding two years of military service between 1963 and 1965, it was the only employment of significance during his working career. As an employee of Collision Center, Ray engaged in all aspects of auto body repair, including estimating the cost of repairs. The job required Ray to frequently lift more than fifty pounds, and involved regular bending, stooping, and squatting. On December 8, 2000, he suffered a back injury while working in the course and scope of his employment.

Ray reported the injury to his sister who is a co-owner of Collision Center. After several days of rest, Ray sought medical treatment from his family physician, Dr. W.R. Vaughn, who ordered an MRI. The film documented a slight disc protusion at L3-4 and L4-5, and a small left-sided disc herniation at L5-S1 with significant narrowing of neural foramen. Dr. Vaughn prescribed conservative treatment including an epidural steroid injection to treat Ray's severe pain, and opined that Ray was incapable of performing work at that time.

Ray was later examined by Dr. Chad Abernathy on February 12, 2001. Dr. Abernathy also recommended conservative treatment including physical therapy. After repeated epidural injections, a diagnostic discogram was administered by Dr. Miller on April 11, 2001. This study confirmed degenerative

disc changes at two vertebral levels, but did not confirm that Ray's pain was attributable to specific discs. Dr. Miller concluded Ray was not a good candidate for more aggressive treatment, and following a functional capacity evaluation (FCE), opined Ray had reached maximum medical improvement.[1]

Ray's initial FCE was administered by Greg Monson, a physical therapist. Despite recommending only light or sedentary work, Monson rated Ray's effort during the evaluation as poor and noted "there was a mild to moderate non-organic component to his presentation." Monson believed Ray's reported pain and disability was out of proportion to the movement patterns and behavior that Monson had observed. Dr. Miller considered the FCE result and ordered permanent physical restrictions including (1) lifting fifteen pounds to shoulder level on an occasional basis, (2) no frequent lifting greater than ten pounds, (3) no frequent pushing or pulling greater than twenty pounds, and (4) alternating positions between sitting and standing every thirty minutes.

A second FCE was requested by Collision Center, and was performed by Dr. Dale Minner on July 18, 2001. Dr. Minner recommended similar work restrictions, limited Ray to light or sedentary work, and noted Ray should

[1]On September 6, 2002, Ray returned to Dr. Abernathy, who ordered a second MRI the results of which indicated similar lower back disc bulges with neural foramen narrowing at L3-4, L4-5, L5-S1. Dr. Abernathy opined that Ray's back condition had not worsened. Dr. Abernathy also recommended conservative treatment such as a facet block and a radio frequency lesion procedure, but did not prescribe any specific treatment. On February 10, 2003, Ray sought a third opinion on his back condition from Dr. Kevin Eck. Dr. Eck also recommended conservative treatment and referred Ray to a pain management center. At the pain center, Dr. Mark Kline administered bilateral facet blocks at L3, L4, and L5, and later performed a radiofrequency neurotomy bilaterally at each level. Ray reported some relief as a result of these treatments.

alternate sitting and standing.[2] In October of 2001, Ray consulted treatment with Dr. Keith Riggins who opined Ray had suffered a six percent permanent partial impairment to his body as a whole.

Ray underwent a third FCE in April of 2003 at the request of Collision Center. The evaluator of this third FCE opined that Ray was at least capable of performing light physical work. This opinion was based in part upon the evaluator's conclusion that Ray had engaged in self-limiting behavior when he stopped seven of seventeen mobility tasks during the evaluation "before specific physical signs of a safe maximal effort were observed."

The results of the third FCE were reported to Dr. Kenneth McMains, who at the request of Collision Center also performed a physical examination of Ray. After consulting Ray's medical history, Dr. McMains' report of May 5, 2003 concluded much of the low back degeneration had occurred before Ray's work injury, and opined that there is no physiological explanation for the tremendous discrepancy between Ray's pre-injury and post-injury physical capacity. Dr. McMains noted Ray's alleged self-limiting behavior reported by Ray's functional capacity evaluators, and opined that depression[3] played a role in Ray's alleged symptom magnification. Although Dr. McMains assigned Ray a five percent whole person impairment rating, the doctor opined that Ray's back condition did

[2] Dr. Minner's clarification to his report made approximately one month after the second FCE was administered suggested a possible non-organic component to Ray's low back condition.

[3] Ray, a veteran of the Vietnam War, has been treated by the Veteran's Affairs Hospital for post-traumatic stress disorder.

not preclude a full recovery or prevent Ray from returning to his previous job after completing a controlled exercise program.

Ray never returned to Collision Center or to any other employment after the injury.[4] Collision Center did not offer to accommodate Ray's return to work under his post-injury physical restrictions despite the fact that a position of estimator was available.[5] In anticipation of litigation, Ray sought the opinion of a vocational expert, Barbara Laughlin, M.A. Based on Ray's limited work skills outside the automotive field, his age, and his significant work restrictions, Laughlin concluded Ray had less than one percent access to the labor market in his community.

At the time of the arbitration hearing, Ray was sixty-two years old and married with two step-children. One of the children was in college at the time of the injury, while the other resided with Ray and his wife. Although the father of both children paid child support, Ray and his wife claimed the children as dependents on their tax returns and also contributed financial support.

The deputy commissioner found Ray was unmotivated and lacked credibility, noting Ray's symptoms exceeded the objective evidence in the record.[6] The deputy also found Ray possesses transferable skills within the

[4] Ray has forgone the opportunity to apply for any position of employment, fearing he would not be paid "a decent wage." Ray also has not availed himself of the retraining services provided by the Iowa Department of Vocational Rehabilitation.

[5] Collision Center was unwilling to provide Ray training on computers that would allow Ray to perform the work of an estimator in the competitive labor market.

[6] The deputy noted Ray's self-limiting behavior observed by the functional capacity evaluators as the basis for her credibility finding. The deputy also suggested Ray lacked motivation to return to work because to do so would threaten Ray's entitlement to social security disability benefits.

automotive field that would allow employment within his physical restrictions as either a parts runner or as an estimator. Despite these findings, the deputy found Ray sustained a permanent total disability as a result of the injury. In making this finding, the Deputy emphasized Ray's age and Collision Center's refusal to make accommodations that would allow Ray to continue working for the company. In particular, the deputy noted "[i]f a family member will not accommodate claimant in the workplace, it is highly unlikely a stranger will offer a position to claimant, a senior member of the labor market."

Because Collision Center paid Ray on commission, the deputy calculated the rate of compensation by computing the average weekly wage over the thirteen weeks immediately preceding the work injury, and arrived at a figure of $731.81 per week. The deputy also concluded Ray could not claim his two step-children as dependents because he had failed to demonstrate that he provided more than half of their support. Based on Ray's two exemptions and his average weekly wage, the deputy concluded the applicable weekly worker's compensation benefit rate was $449.22 per week. The deputy awarded penalty benefits equaling $17,968.80 based upon (1) a finding that Collision Center unreasonably failed to pay Ray more than fifty weeks of permanent partial disability benefits, and (2) a finding that thirty-three weeks of benefits paid by Collision Center's insurance carrier were tendered late.

Both Ray and Collision Center appealed the deputy's ruling to the commissioner. The commissioner found on de novo interagency review that the injury caused only a forty percent loss of earning capacity. The agency's appeal decision rejected Ray's assertion that he is permanently and totally disabled after

finding that Ray possesses marketable skills within the automotive field despite his age and "mild to moderate" physical disability. The appeal decision affirmed the deputy's calculation of Ray's average weekly wage, noting that the thirteen consecutive calendar weeks leading up to the work injury were fairly representative of Ray's typical earnings. However, the commissioner reversed the deputy's rate calculation after finding Ray is entitled to a total of four exemptions including one each for his two stepchildren. With four exemptions, the commissioner concluded the applicable weekly rate of compensation for this injury is $467.51. The commissioner concluded Collision Center's decision to voluntarily pay only fifty weeks of permanent partial disability benefit payments based on a ten percent industrial disability was not unreasonable under the circumstances. However, the commissioner found that Collision Center's late payment of thirty-three weeks of benefits and its underpayment of $7.15 per week for eighty-two weeks of temporary and permanent disability benefits entitled Ray to penalty benefits of $4,000.

Both parties sought judicial review. The district court affirmed the commissioner's decision in all particulars. Ray now appeals, contending (1) substantial evidence supports a finding of permanent total disability, (2) the commissioner's calculation of average weekly wage is not fairly representative of his typical earnings, and (3) substantial evidence supports the penalty benefits awarded by the deputy rather than the lesser amount ordered by the commissioner. For its part, Collision Center cross-appeals, contending (1) a forty percent industrial disability award is not supported by the agency record (2) the agency erred in its calculation of the weekly compensation rate because Ray is

not legally entitled to two exemptions for his step-children, and (3) no penalty benefits were justified in this case.

II. Scope and Standard of Review.

Our review of a final decision of the Workers' Compensation Commissioner, like that of the district court, is for correction of errors of law. *Second Injury Fund of Iowa v. Shank,* 516 N.W.2d 808, 812 (Iowa 1994). In determining whether the district court erred in exercising its power of judicial review, we apply the standards of Iowa Code section 17A.19(10) (2003) to the agency action to determine whether our conclusions are the same as those of the district court. *Williamson v. Wellman Fansteel,* 595 N.W.2d 803, 806 (Iowa 1999); *E.N.T. Assocs. v. Collentine,* 525 N.W.2d 827, 829 (Iowa 1994). As to the agency's factual determinations, the court shall reverse, modify, or grant other appropriate relief from agency action if it determines substantial rights of the person seeking judicial relief have been prejudiced because the agency action is based upon a determination of fact, clearly vested by a provision of law in the discretion of the agency, that 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); *Mycogen Seeds v. Sands* 686 N.W.2d 457, 463-65 (Iowa 2004).

III. Discussion.

A. Extent of the Industrial Disability.

Industrial disability is a measure of the injured worker's lost earning capacity. *Shank,* 516 N.W.2d at 813. While it is undisputed Ray suffered a low back injury while working for Collision Center, the parties dispute the extent to which this work injury impaired Ray's earning capacity. In assessing diminution

in earning capacity, the commissioner must factor the employee's functional impairment, age, intelligence, education, qualifications, experience, and ability to engage in employment for which the employee is fit. *Id.* Because this assessment is vested by law in the discretion of the commissioner who possesses the expertise necessary to properly weigh these factors, we give appropriate deference to the commissioner's findings with respect to the extent of industrial disability. Iowa Code § 17A.19(11)(c).

Ray contends the deputy correctly found a permanent total disability. That finding was supported by the opinion of vocational expert Laughlin, who opined Ray's age, narrow work experience, and physical restrictions effectively foreclosed all access to the labor market. Ray also contends that Collision Center's refusal to rehire him and accommodate his physical restrictions is strong support for Laughlin's opinion and the deputy's disability finding.

Collision Center views the case much differently. It contends the agency record does not support a finding of even a forty percent industrial disability. This contention focuses on evidence of Ray's alleged symptom magnification reported by three functional capacity evaluators. Collision Center also claims Ray's lack of motivation to obtain work within his present restrictions and skills-set or to obtain training outside the automotive field supports a finding that Ray lost no more than ten percent of his earning capacity as a consequence of the injury.

After a careful review of the record consistent with our scope and standards of review, we conclude the commisioner's forty percent industrial disability finding is supported by substantial evidence. We note of all the physicians who examined Ray, only his family physician, Dr. Vaughn, concluded

Ray could not return to light or sedentary work. We cannot on this record conclude as a matter of law that the commissioner erred when he found Ray is able to perform the work of a parts runner for an auto repair business. Ray's own testimony suggested that with some computer training, he could perform the job of a modern auto body repair estimator. While it is true that older workers encounter challenges in finding retraining opportunities or employment in a new field, *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 266 (Iowa 1995), it is also true that injured workers of any age who choose not to attempt to secure employment or retraining will likely not find them. Ray never applied for a single position after his injury, nor did he inquire about retraining opportunities now available through the Iowa Department of Vocational Rehabilitation. Given these facts and others in the record, the commissioner was not required as a matter of law to find a permanent total disability in this case.

However, we also conclude Collision Center's contention that the agency record cannot sustain a finding of even a forty percent industrial disability is also without merit. Every treating physician opined that Ray had a degenerative disc disorder and significant pain, and each imposed physical restrictions limiting Ray to light or sedentary work. These restrictions were recommended notwithstanding three functional capacity reports alleging that Ray had exhibited self-limiting behavior or symptom magnification during testing. Although we have concluded substantial evidence supports the agency's finding that Ray has post-injury residual earning capacity, we must reject Collision Center's assertion that such capacity exceeds sixty percent as a matter of law. Substantial evidence supports the agency's finding of more than the nominal industrial disability

advanced by Collision Center. Giving proper deference to the commissioner's expertise in assessing industrial disability, Iowa Code § 17A.19(11)(c), we affirm on this issue.

B. Average Weekly Wages.

Ray next contends the commissioner included several weeks in assessing his average weekly wage that were not representative of his typical weekly earnings. *See* Iowa Code § 85.36(6). Ray asserts the commissioner should have excluded from the calculus any week where Ray earned less than $600. Ray's wage statements for the thirteen weeks preceding his work injury reveal that Ray's earnings ranged from a maximum of $1,064 to a minimum of $424, with the remaining weeks falling within a range between $650 and $850. Evidence in the record suggests that as a commissioned employee, Ray was paid when a particular repair job was completed. Consequently, his weekly income fluctuated greatly from week to week. Ray has failed to demonstrate why the two weeks of earnings falling below the $600 mark are not fairly representative of his typical earnings. We note Ray does not contend the week in which he earned $1,064 should be excluded, despite the fact that it is $200 more than the next highest week of earnings. We conclude substantial evidence supports the commissioner's average weekly wage calculation as fairly representative of Ray's typical earnings given the broad fluctuation in earnings evident in the wage statements.

C. Exemptions.

As we have noted, the commissioner found Ray is entitled to claim four exemptions when calculating the applicable weekly benefit rate. Collision Center

contends that finding is unsupported in the record because Ray's two step-children were supported by their biological father's child support payments, and because Ray failed to prove he provided the requisite amount of support to render the children dependents for purposes of workers' compensation rate calculation. In the case of a deceased employee, a step-child is conclusively presumed to be a dependent where the deceased employee "actually provided the principal support for such child or children." Iowa Code § 85.42. Although dependents of an injured employee are not similarly defined in the workers' compensation statute, we see no reason to believe the criteria for identifying Ray's dependents must be different.

The fact that Ray's step-children received financial support from their biological father does not, however, preclude a finding that Ray provided the children's principal support. As the agency noted, it is Ray, not the biological father, who claimed the children as dependents on his federal and state tax returns. Although we acknowledge that Ray did not offer evidence of the exact amount of monetary support he provided to the children, we believe his tax returns constitute substantial evidence supporting the agency's finding of the children's dependency for purposes of rate calculation. Accordingly, we affirm on this issue.

D. Penalty.

We next address the agency's penalty award which both parties assign as error. Ray urges that the commissioner erred in awarding only $4,000 in penalty benefits; Collision Center claims no penalty is justified here because its payments were not unreasonably withheld or delayed. An employee "is entitled

to penalty benefits if there has been a delay in payment unless the employer provides a reasonable cause or excuse." *Sands*, 686 N.W.2d at 469. It is of course not this court's province to act as a fact-finder. Just as the applicable standard of review does not authorize this appellate court to substitute its judgment *on this record* for that of the agency on the question of whether Ray lost forty percent or the entirety of his earning capacity as a consequence of the injury, we are likewise not empowered to disturb the agency's penalty determinations if they are supported by substantial evidence and not unreasonable or arbitrary. Finding no infirmity in the agency's penalty award on either score, we must affirm.

IV. Conclusion.

We find substantial evidence supports the commissioner's findings that (1) Ray suffered a forty percent permanent industrial disability, (2) the thirteen consecutive weeks immediately preceding Ray's injury fairly represent Ray's typical earnings notwithstanding the wide fluctuation in his commissions, (3) Ray is entitled to four exemptions in calculating his weekly benefit, including two for his dependent step-children, and (4) Ray is entitled to penalty benefits totaling $4,000 based on Collision Center's unreasonable delay in tendering thirty-three weeks of workers' compensation benefits and underpayment of $7.15 per week for eighty-two weeks. We therefore affirm on both the appeal and the cross-appeal.

AFFIRMED.