

IN THE COURT OF APPEALS OF IOWA

No. 7-100 / 06-0753
Filed April 11, 2007

DONALD EDWARD BRIGHT,
Petitioner-Appellant,

vs.

**SUPERVALUE, INC., Employer, and
LIBERTY MUTUAL INSURANCE CO.,
Insurance Carrier,**
Respondent-Appellees.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

Petitioner appeals the decision of the district court which affirmed the workers' compensation commissioner's denial of his request for additional benefits in review-reopening proceedings. **AFFIRMED.**

Max Burkey and James J. Beery, Des Moines, for appellant.

Amanda M. Richards of Betty, Neuman & McMahon, P.L.C., Davenport,
for appellees.

Considered by Zimmer, P.J., and Baker, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BEEGHLY, S.J.**I. Background Facts & Proceedings**

Donald Bright began working as a warehouse employee for SuperValu, Inc., in 1972. He injured his back on February 1, 1997, during the course of his employment. Bright had surgery on his back in February 1997. After the surgery he was given a lifting restriction of fifty pounds. Bright was reassigned to a job of grocery receiving clerk at SuperValu. He sought workers' compensation benefits.

After an administrative hearing, on April 27, 2000, a deputy workers' compensation commissioner found:

In the case at hand it appears that the claimant will be able to continue his employment at SuperValu in a job within his physical restrictions. However, if the claimant should lose his employment his lack of job experience outside of SuperValu will affect his ability to gain other employment in the labor market.

Therefore, in this case, it is found that claimant suffered a 20 percent industrial disability as a result of the work injury after consideration of all factors of industrial disability.

No appeal was taken of this decision.

The SuperValu warehouse closed in April 2002, and Bright was terminated from his employment. He had been earning \$16.71 per hour at SuperValu. After nearly a year, Bright got a job at a used car lot for ten dollars per hour. He worked there for six months, then got a job as a custodian for the Indianola School District, at \$10.17 per hour. Bright requested additional workers' compensation benefits in review-reopening proceedings, claiming there were increased economic consequences as a result of his injury.

A deputy workers' compensation commissioner determined Bright had shown an economic change of condition since the prior award because his earning capacity had decreased. The deputy determined Bright's industrial disability was forty percent. Because Bright had already received an award of twenty percent, the deputy determined he was entitled to an award of an additional twenty percent industrial disability.

The deputy's decision was reversed by the workers' compensation commissioner. The commissioner found that while Bright's economic circumstances had changed, the change in condition was not proximately caused by the work-related injury. The commissioner determined the arbitration decision of April 2000 contemplated Bright might lose his employment at SuperValu, and took consideration of this in the original award. On judicial review, the district court affirmed the commissioner. Bright appeals the decisions of the district court and the commissioner.

II. Standard of Review

Our review is governed by the Iowa Administrative Procedure Act. Iowa Code ch. 17A (2003); *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 216 (Iowa 2004). We review the district court's decision by applying the standards of section 17A.19 to the agency decision to determine if our conclusions are the same as those reached by the district court. *University of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

III. Merits

When an employee seeks an increase in workers' compensation benefits in a review-reopening proceeding, the employee must show a decreased earning capacity proximately caused by the original injury. *Acuity Ins.*, 684 N.W.2d at 216-17. The circumstances giving rise to the decrease in earning capacity must not have been within the contemplation of the parties at the time of the original award. *Id.* at 217.

Bright contends that the award he received in the April 2000 arbitration decision was smaller than it would have been otherwise if he did not have continued employment with SuperValu. He states that because he now lost his job at SuperValu, he has suffered an economic change in circumstances, and should be entitled to an additional award of workers' compensation benefits.¹

In our review of the deputy's decision of April 2000, we determine the deputy fully considered that Bright might lose his employment at SuperValu and have to find other work. At the time of the April 2000 decision, Bright had no loss of earnings. In giving an award of twenty percent industrial disability, the deputy considered, "if the claimant should lose his employment his lack of job experience outside of SuperValu will affect his ability to gain other employment in the labor market." Bright has not shown a loss of earning capacity which was not within the contemplation of the parties at the time of the original award. *See id.*

¹ In a review-reopening proceeding, an employee may show a decrease in earning capacity without showing a change in physical condition. *Simonson v. Snap-On Tools, Corp.*, 588 N.W.2d 430, 435 (Iowa 1999). In this case, Bright is not alleging a change in his physical condition.

Furthermore, Bright has failed to show a reduction of earning capacity proximately caused by the original injury. Where an employee's change in economic circumstances is caused by factors other than the original injury, such as downsizing by the employer, the employee is not entitled to increased benefits in a review-reopening proceeding. See *Simonson v. Snap-On Tools, Inc.*, 588 N.W.2d 430, 435 (Iowa 1999) (finding decrease in earning capacity due to personal decision to take care of grandchildren); *US West Communications, Inc. v. Overholser*, 566 N.W.2d 873, 877 (Iowa 1997) (finding decrease in earning capacity due to subsequent injuries, downsizing by employer, lack of seniority, and job-seeking skills).

The result in this case may have been different had there been a specific finding that there was a reduction in the initial award due to the accommodation of the employer. See *Gallardo v. Firestone Tire & Rubber Co.*, 482 N.W.2d 393, 396 (Iowa 1992) ("The commissioner's ruling in the first review-reopening proceeding made it plain that, but for evidence of Firestone's willingness to continue Gallardo's employment, he would be entitled to an industrial disability rating of fifty percent. Because of Firestone's professed willingness to accommodate him, the disability rating was adjusted downward ten percent.").

We find substantial evidence in the record to support the commissioner's decision that Bright's reduction in earning capacity was caused by the closing of the SuperValu warehouse, not his original injury. We affirm the decision of the district court and the workers' compensation commissioner.

AFFIRMED.