

IN THE COURT OF APPEALS OF IOWA

No. 7-159 / 06-1796
Filed April 25, 2007

**MODERN PIPING and
OLD REPUBLIC INSURANCE CO.,**
Petitioners-Appellants,

vs.

ARNOLD MICHAEL LANE,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,
Judge.

The petitioners appeal the district court's order on judicial review
confirming the final agency decision. **AFFIRMED.**

Timothy W. Wegman and Joseph Barron of Peddicord, Wharton, Spencer
and Hook, L.L.P., Des Moines, for appellants.

Thomas Wertz and Matthew Dake of Wertz Law Firm, P.C., Cedar Rapids,
for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Modern Piping and Old Republic Insurance Company (collectively “Modern Piping”) appeal the district court’s order on judicial review affirming the decision of the Iowa Workers’ Compensation Commission in favor of claimant Arnold Lane. Because we agree with the conclusions of the district court that Lane is an odd-lot employee and totally disabled, we affirm.

I. Background Facts and Proceedings.

Lane was age fifty-five at the time of hearing and had worked as a pipe fitter since 1976. In the last eight to ten years, he worked primarily for Modern Piping. Lane dropped out of school in the 12th grade but later obtained his GED while in the military. His work history consisted primarily of heavy physical labor, including sheet metal work and pipefitting.

Lane described his work as a pipe fitter as “brutal,” frequently requiring heavy lifting, crawling under and around equipment, kneeling on rocks, climbing ladders, and squatting in various positions. He had a prior injury to his left ankle in the early 1970s, and sought chiropractic care for neck, low-back, and left-knee pain in 1999. On August 3, 2000, while at work, Lane fell backwards and tried to break his fall with his left arm. He sustained a fracture to his left wrist and injury to both shoulders. Lane’s treating physician, orthopedist Dr. James Pape, ordered an MRI of the left shoulder which revealed a large rotator cuff tear. In December 2000, orthopedic surgeon Dr. David Hart operated on that shoulder. A second MRI, this time on the right shoulder, revealed a full-thickness supraspinatus tear. In April 2001, Dr. Hart operated on Lane’s right shoulder. Lane was released to work on June 1, 2001, with the following restrictions: ten

pounds for unilateral lifting, thirty pounds for bilateral lifting, no above-shoulder reaching, no climbing, and no reaching or repetitive movement with either arm. Because of the many restrictions, Lane estimated he was only able to perform approximately twenty percent of his regular duties and not able to put in the overtime normally required by his job. In January 2002, Dr. Hart determined Lane should have permanent work restrictions detailed as: only lifting using both arms, lifting no more than twenty pounds to shoulder height, lifting no more than thirty pounds from ground level to waist height, no reaching above shoulder level with either arm, no climbing, no repetitive pipewrenching, and no repetitive movements in general. Dr. Hart measured Lane's impairment ratings as thirteen-percent whole body for the left shoulder, one-percent whole body for the right shoulder, and twelve-percent permanent functional impairment for the left wrist. He added, "The patient in the long run would probably be better off to find less strenuous work." He renewed a prescription for 800 mg Motrin, noting that Lane may need this medication on a permanent basis. On May 15, 2002, Lane, along with over a dozen other pipe fitters, was laid off work by Modern Piping. He has not been employed since then.

In September 2002, Lane underwent a mental status evaluation by Dr. Owen Duffy, who opined Lane's ability to concentrate was compromised by his high level of pain and attendant poor sleep habits. Dr. Duffy observed that Lane was a friendly person, with good social skills but was being treated for depression because of his current situation. While noting Lane expressed a desire to work again, Duffy indicated Lane probably had learning disorders that would make academic studies difficult for him.

Lane continued to experience discomfort in his shoulders, neck, and back. In November 2002, Dr. Hart took knee and spinal x-rays, which revealed osteoarthritis in Lane's right knee and degenerative disc disease of the cervical, thoracic, and lumbar spine. His progress notes indicated both shoulders with rotator cuff tears had repaired but left Lane with residual pain and weakness. Dr. Hart noted, "Obviously, given the multitude of musculoskeletal problems, it is going to be difficult for him to be employable."

On October 24, 2003, Lane filed a petition for workers' compensation benefits stemming from the August 3, 2000 injuries. Dr. Ray Miller performed an independent medical examination in February 2004. Lane related to Dr. Miller his continuing sleep problems due to the pain primarily in his left shoulder, spine, and knees. Dr. Miller concluded that Lane's bilateral knee arthritis and pain were not directly attributable to his August 2000 fall, but "more likely [were] related to cumulative trauma with wear and tear over the years" of heavy labor doing welding and pipefitting. While concluding Lane had currently reached maximum medical improvement, he noted Lane was likely a candidate for future right knee replacement and otherwise offered the following impairment ratings: a twenty-five percent permanent functional impairment for the right knee, or ten-percent whole body with five percent from work-related activities; a twenty-percent lower extremity permanent functional impairment, or eight-percent whole body with four percent work-related; five-percent impairment of the upper extremity for the right shoulder, or three-percent whole body; and eleven-percent total impairment of the left shoulder regarding restricted range of motion. Dr. Miller agreed with Dr. Hart's conclusion that Lane was "disabled from gainful employment" due to

multiple areas of impairment. Lane filed a second claim on June 15, 2004, based upon bilateral cumulative injury to his knees with an injury date of August 3, 2000, or his last date of employment with Modern Piping, May 15, 2002.

Lane was also evaluated by a vocational rehabilitation specialist, Susan McBroom. After reviewing records and meeting with Lane, McBroom prepared a report dated February 17, 2004, concluding Lane “would be able to perform a number of sedentary jobs, to include some semi-skilled and entry-level positions,” most needing some accommodation. McBroom did consult Dr. Hart in late August 2004 regarding Lane’s work restrictions, to which Dr. Hart concluded that Lane could participate in vocational rehab but only at the sedentary level. Dr. Hart reiterated that Lane “should not be involved in any lifting or carrying activities, no standing or walking, and sitting for prolonged lengths of time would also be contraindicated.” Lane was also evaluated by Clark H. Williams, a rehabilitation consultant, who opined that due to Lane’s mental status, he “is not a candidate for retraining . . . [and] not placeable.”

A contested arbitration hearing took place on October 22, 2004, with the parties stipulating that Lane sustained injuries on August 3, 2000, and was paid 124 weeks of permanent partial disability benefits at the weekly rate of \$648.95. The defendants denied that Lane’s knee injuries arose out of and in the course of his employment and further challenged the claim for want of timely notice under Iowa Code section 85.23, as well as filing beyond the two-year statute of limitations of section 85.26. The deputy gave considerable weight to Dr. Miller’s opinion and Dr. Hart’s earlier opinion of November 2002 that it would be difficult for Lane to be employable due to his multiple areas of impairment. Placing little

weight on McBroom's testimony, the deputy found it would be difficult for Lane to be employed in the general labor market on a regular and recurring basis because of the injuries to his shoulders and knees and that Lane was permanently and totally disabled as an odd-lot employee. Dismissing the notice and statute of limitations defenses, the deputy concluded that Lane did not discover the serious and compensable nature of his knee injuries until February 2004 with Dr. Miller's independent medical evaluation, and that Dr. Miller's report following that exam gave notice to the defendants of Lane's cumulative injury. The claimed medical expenses were found to be related to injuries Lane sustained while working for Modern Piping and compensable as such.

On intra-agency appeal, the commissioner affirmed all findings of the arbitration decision with the following addition:

Claimant was rendered totally disabled by the shoulder injuries of August 3, 2000. It was only the employer's accommodation with light duty work that kept him employed. Once that accommodation ended due to layoff, the full impact of the disability became manifested. Disability from the bilateral knee condition only became manifested after claimant became totally disabled by the shoulder injury. Prior to that time, claimant's knees had not had an actual adverse impact on his employment and a date of injury under the cumulative trauma rule had not yet occurred. Accordingly, the notice and claim for the knees was timely. However, since claimant was already totally disabled, no additional weekly compensation is payable for the knee injury.

Modern Piping sought judicial review of the final agency decision, asserting that Lane failed to prove he was permanently and totally disabled as an odd-lot employee and that Lane's cumulative knee injury claim was barred by section 85.23 and the statute of limitations of section 85.26. The district court agreed with the commissioner that Lane's shoulder injuries alone rendered him

permanently and totally disabled and that Dr. Miller's assessment on February 11, 2004, served as notice to Lane of the seriousness and compensable nature of his cumulative knee injury claim. However, the court acknowledged this determination is effectively moot because Lane could not receive more compensation than he was already awarded from his shoulder injuries. Modern Piping appeals.

II. Scope and Standards of Review.

Our review of an industrial commissioner's decision is for correction of errors at law. *Simonson v. Snap-On Tools Corp.*, 588 N.W.2d 430, 434 (Iowa 1999). In exercising its judicial review power of a final agency decision, the district court acts in an appellate capacity to correct any errors of law by the agency. *Iowa Ag Const. Co., Inc. v. Iowa State Bd. of Tax Review*, 723 N.W.2d 167, 172 (Iowa 2006). When we review the district court's decision, "we apply the standards of chapter 17A to determine whether the conclusions we reach are the same as those of the district court." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464 (Iowa 2004). "If they are the same, we affirm; otherwise we reverse." *Id.*

The district court may reverse or modify an agency's decision if the agency's decision is erroneous under a ground specified in the Iowa Administrative Procedures Act, and a party's substantial rights have been prejudiced. Iowa Code § 17A.19(10) (2005). The reviewing court can only grant the petitioner's requested relief from the commissioner's decision if a determination of fact by the commissioner "is not supported by substantial evidence in the record before the court when that record is viewed as a whole."

Id. § 17A.19(10)(f). Evidence is substantial for purposes of reviewing the decision of an administrative agency when a reasonable person could accept it as adequate to reach the same finding. *Asmus v. Waterloo Community School Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). Just 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. *Arndt v. City of Le Claire*, ___N.W.2d___, ___ (Iowa 2007). An appellate court should not consider evidence insubstantial merely because the court may draw different conclusions from the record. *Fischer v. City of Sioux City*, 695 N.W.2d 31, 33-34 (Iowa 2005).

III. Permanent and Total Disability.

Modern Piping asserts that substantial evidence does not support the agency's decision that Lane is permanently and totally disabled as an odd-lot employee. "An odd-lot employee is one who is incapable of finding work in any established branch of the labor market." *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 267 (Iowa 1996). The odd-lot worker's skills and services are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 105 (Iowa 1985) (quoting *Lee v. Minneapolis St. Ry. Co.*, 230 Minn. 315, 41 N.W.2d 433, 436 (Minn. 1950)). The worker is considered totally disabled because a lack of steady employment precludes any material earning capacity. *Nelson*, 544 N.W.2d at 267. In order to qualify for odd-lot status, a worker must establish a prima facie case "by producing substantial evidence that the worker is not employable in the competitive labor market." *Guyton*, 373 N.W.2d at 106. Our

supreme court has held, however, that actually looking for work is not required. *Nelson*, 544 N.W.2d at 267. In lieu of a good faith effort to find employment, a worker may introduce “other substantial evidence that he has no reasonable prospect of steady employment.” *Id.* (finding evidence sufficient where worker introduced evidence from two vocational rehabilitation experts and a doctor). The court may also consider factors such as the worker’s physical impairment, intelligence, education, training, ability to be retrained, and age. *See id.*; *Guyton*, 373 N.W.2d at 106. Once the prima facie case is established, the burden shifts to the employer to produce evidence of suitable employment. *Nelson*, 544 N.W.2d at 267. The practical effect of this burden-shifting rule is that when a claimant is an odd-lot employee, there is a presumption that no jobs are available unless the employer introduces evidence of such work. *Michael Eberhart Const. v. Curtin*, 674 N.W.2d 123, 126 (Iowa 2004) (citation omitted).

We conclude the district court properly determined there is sufficient evidence in the record supporting the commissioner’s decision that Lane was totally and permanently disabled as an odd-lot employee. Two medical opinions, from treating physician Dr. Hart in November 2002 and independent examination physician Dr. Miller in February 2004, concluded that Lane’s shoulder injuries were significant and required permanent work restrictions. Dr. Duffy also concluded that Lane’s injuries impacted his mental acuity and ability to perform daily tasks due to pain and lack of sleep and that any prognosis for further education was guarded. Finally, rehabilitation specialist Williams also believed that Lane was neither retrainable nor placeable. These four professional opinions, combined with Lane’s age, level of education, sole vocational training

and work history in heavy manual labor, mental capacity, permanent work restrictions, and ability to be retrained qualify him as an odd-lot employee on the basis of his shoulder injuries alone. While Modern Piping attempted to rebut the presumption with Susan McBroom's testimony, the hearing deputy discounted both her report and testimony. The deputy also determined that Dr. Hart's later, modified stance on Lane's employability after consulting McBroom, and without a follow-up visit with Lane, was less credible than his initial November 2002 opinion. Our supreme court has recently reiterated,

It is the commissioner's duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue. The reviewing court only determines whether substantial evidence supports a finding "*according to those witnesses whom the [commissioner] believed.*"

Arndt v. City of Le Claire, ___N.W.2d___, ___ (Iowa 2007) (citations omitted).

Other than McBroom's evidence and Dr. Hart's revised opinion, Modern Piping produced no evidence as to suitable employment available to Lane in the general labor market considering his abilities, training, and restrictions.¹ We therefore affirm, agreeing with the district court's conclusions, finding substantial evidence supporting the commissioner's decision that Lane is totally and permanently disabled as an odd-lot employee stemming from his shoulder injuries alone.

IV. Cumulative Trauma, Notice, and Limitation Period.

Due to the above determination, the issues surrounding Lane's knee injuries do not affect his disability status or rate of compensation. However,

¹ A videotaped surveillance of Lane's personal activities at home was introduced at hearing, but appeared to the deputy to be either irrelevant or actually supportive of Lane's difficulty in moving about in daily activities.

because payment for medical benefits due to Lane's knee injuries may arise in the future, it is necessary for us to review the timeliness of his cumulative trauma claim. Up until Lane's termination from Modern Piping in May 2002, no doctor had given impairment ratings or placed work restrictions on Lane because of his knees. Therefore, it cannot be said that Lane's cumulative knee injury adversely affected his ability to maintain his employment. The knee injuries did not manifest as a disability until after Lane's shoulder injuries rendered him disabled, as stated by the commissioner. Even after an injury occurs, the statute of limitations for a workers' compensation claim,

[W]ill not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the nature, seriousness, and probable compensable character of his injury or condition.

Herrera v. IBP, Inc., 633 N.W.2d 284, 288-89 (Iowa 2001). In spite of the fact that Lane sought some medical treatment for at least one knee in the past, the record reflects that Lane was not aware of the serious, permanent adverse impact on his employability before Dr. Miller's examination that, for the first time, placed permanent impairment ratings and work restrictions on him because of his knees. It was therefore February 11, 2004, that his workers' compensation claim for the cumulative injury accrued and began the limitation period. Lane filed his claim for the cumulative knee injury in June 2004, well within the two-year limitation. We affirm on the statute of limitation issue.

Modern Piping also appeals on the determination that Lane's cumulative injury claim satisfied the 90-day notice required by Iowa Code section 85.23. The deputy found in the initial arbitration ruling that the report by Dr. Miller

following his independent medical examination of Lane in February 2004 gave Modern Piping actual notice of Lane's cumulative injury. The commissioner affirmed that notice to Modern Piping was timely given. The district court agreed, stating,

The court does not find in their appeal brief where Modern Piping and Old Republic Insurance Company dispute the finding by the deputy commissioner that they were made aware of Dr. Miller's evaluation in February 2004. Therefore, this court concludes there is substantial evidence in the record to support the finding by the deputy commissioner² that Lane discovered his cumulative bilateral knee injury on February 11, 2004, and Modern Piping and Old Republic Insurance Company received Dr. Miller's evaluation and thus had actual knowledge of the injury in February 2004, well within the ninety day notice requirement. Therefore, Lane's cumulative bilateral injury claim should not be barred in this action.

We agree that Modern Piping was notified of the cumulative injury with Dr. Miller's report of February 2004, satisfying the requirements of section 85.23 that the employer have notice within ninety days of the injury. We affirm.

AFFIRMED.

² Although the district court on judicial review referred to the deputy's findings, these findings were specifically affirmed and adopted as final agency action by the commissioner's one-page appeal decision. See Iowa Code § 17A.19(1).