

**IN THE COURT OF APPEALS OF IOWA**

No. 7-622 / 07-0270  
Filed September 19, 2007

**BLUFFS RUN CASINO,**  
Petitioner-Appellant,

**vs.**

**SUSAN E. KRAMER,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

Petitioner appeals from the district court's decision affirming the workers' compensation commissioner's award of workers' compensation benefits.

**AFFIRMED.**

Bill Lamson and Paul Prentiss of Timmermier, Gross & Prentiss, Omaha, Nebraska, for appellant.

Richard Crowl and James Thorn of Stuart Tinley Law Firm, L.L.P., Council Bluffs, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

**ZIMMER, J.**

Petitioner, Bluffs Run Casino, appeals from the district court's decision affirming the workers' compensation commissioner's award of workers' compensation benefits to claimant, Susan Kramer, for a work-related back injury on June 14, 2004. Bluffs Run Casino claims the court erred in finding the commissioner's decision that Kramer was an odd-lot worker was supported by substantial evidence. After reviewing the record and considering the arguments presented, we affirm the decision of the district court.

***I. Background Facts and Proceedings.***

Both parties have stipulated that Susan Kramer injured her back on June 14, 2004, during the course of her employment as a housekeeper at Bluffs Run Casino. She was given medical restrictions to lift no more than twenty pounds and to limit her bending, squatting, and kneeling. She was advised not to do any vacuuming and only occasional mopping. Kramer was discharged from her employment on January 12, 2005, because the employer did not have work she could do based on her restrictions.

Dr. William Tiemann was the physician designated by Bluffs Run Casino to treat Kramer. He saw Kramer eight times between July and October 2004 and diagnosed her as having lumbar pain syndrome and a degenerative lumbar disc problem. Dr. Donald Gammel performed an independent medical examination of Kramer and determined she had sustained a permanent aggravation of her degenerative lumbar disc disease during the course of her work-related duties on June 14. He determined her work-related injury had resulted in a five percent permanent partial impairment with medical restrictions.

Kramer was born in 1955. She has a tenth grade education and has been unable to obtain a GED despite her repeated attempts. Her last tested IQ score was 81. She has great difficulty reading. She does not drive, and she does not have a driver's license. Her work history includes being a homemaker for more than a decade, a cashier for four years in the 1970s, and a collator for less than one year. She began working as a housekeeper for Bluffs Run Casino in 1995, where her duties included vacuuming, mopping, scrubbing, and picking up garbage. She was required to carry five-gallon buckets partially filled with water, hoses, and attachments up and down stairs.

After her termination, Kramer sought employment with over seventy-five employers. Her applications were done with the assistance of Iowa Workforce Development. Many of these employers were not hiring. Kramer sought specific employers who were suggested to her by a vocational rehabilitation expert, Jim Rogers. Rogers specifically contacted employers to determine what the labor market prospects were for someone with her restrictions. Rogers and Workforce Development provided Kramer with guidance on which jobs to apply for and how to prepare for an interview.

Rogers evaluated Kramer and issued a report on May 2, 2005, indicating Kramer's loss of earning capacity was between fifty and sixty percent. On July 22, he issued a follow-up report indicating that Kramer had applied for approximately fifty more jobs without success since his last evaluation, and he stated her loss of earning capacity was now one hundred percent. In this report, Rogers concludes,

Though Susan is quite discouraged, I encouraged her to continue searching for work and cooperating with State Vocational Rehabilitation and Job Service. I also recommended that she work on her GED again, though I believe her chances of success will be marginal. If she could complete her GED, I believe her employability prospects would be enhanced. At this time I believe Susan best fits the description of a 'odd-lot' worker. Though she is not in a state of absolute helplessness and while she may be able to do occasional trivial work, the quality, quantity, and dependability of the work she can perform is so limited that there is no reasonably stable market for her services.

Ronald Schmidt, a vocational rehabilitation consultant retained by Bluffs Run Casino, disputed Rogers' opinion that Kramer was an odd-lot worker and opined that she had experienced a twenty-five to thirty percent loss of earning capacity. He indicated that Kramer had the ability and skills to perform jobs in six different categories in the Council Bluffs area. However, Schmidt did not actually contact any employers in the geographic area to see if any real jobs were available for Kramer.

Kramer filed a claim seeking workers' compensation benefits on October 4, 2004. An arbitration hearing was held. Following the hearing, a deputy commissioner issued a decision determining that as a result of her June 14 injury Kramer was permanently and totally disabled and was entitled to penalty benefits and medical expenses. Bluffs Run Casino filed an appeal before an interim workers' compensation commissioner who subsequently affirmed the decision of the deputy commissioner, specifically the determination that Kramer was an odd-lot employee. The district court affirmed the agency's decision. Bluffs Run Casino appeals.

## **II. Scope and Standards of Review.**

Our review of a final agency action is governed by Iowa Code chapter 17A and is confined to correction of errors of law. Iowa Code § 17A.19 (2003); *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 354 (Iowa 1998). We will uphold the agency's action if it is supported "by substantial evidence in the record made before the agency when that record is viewed as a whole." Iowa Code § 17A.19(10)(f). Evidence is substantial when a reasonable person could accept it as adequate to reach the same findings. *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 the evidence supports the findings the commissioner actually made. *City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 536 (Iowa 1996). "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." *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-95 (Iowa 2007). We may not "improperly weigh[ ] the evidence to overrule the commissioner's findings." *Id.* at 395.

## **III. Discussion.**

Bluffs Run Casino contends the district court erred in affirming the appeal decision of the workers' compensation commissioner because there was not substantial evidence to support the commissioner's finding that the claimant was an odd-lot worker. In order to come within the odd-lot doctrine, an employee must meet the burden of production of evidence to make a prima facie case of total disability by producing substantial evidence that the employee is not employable in the competitive labor market. *Second Injury Fund v. Nelson*, 544

N.W.2d 258, 267 (Iowa 1995). An employee can meet this burden by demonstrating a reasonable, but unsuccessful, effort to secure employment. *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 105 (Iowa 1985). Alternatively, an employee can introduce substantial evidence of no reasonable prospects of steady employment. *Nelson*, 544 N.W.2d at 267.

We are bound by the commissioner's factual findings if they are supported by substantial evidence. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). Bluffs Run Casino asserts the commissioner and the district court relied upon flawed statements and conclusions in determining that Kramer had conducted a reasonable job search. They point out that Kramer completed only thirteen written applications of the seventy-five positions she applied for. The district court stated while "[t]here is some dispute as to the extent of [Kramer's] job search," but concluded that "[i]n reviewing the record as a whole, there is substantial evidence in the record indicating that Mrs. Kramer made a reasonable but unsuccessful effort to find steady employment." We agree. Rogers' report, which was considered by the commissioner, indicates Kramer went to "Job Service every two weeks and usually spends half a day, every other day, searching for work and has done this on a consistent basis." Additionally, his report states Kramer worked with State Vocational Rehabilitation in finding a job and had her son help her apply for jobs online.

Kramer's search for alternate employment, however, was only one factor considered by the commissioner. In addition to Kramer's job search following her termination, the commissioner also properly considered Kramer's age, IQ, prior work history, lack of reading skills, and the severe restrictions on her ability to

perform manual labor tasks in determining whether she presented a prima facie case showing she came within the odd-lot doctrine. See *Nelson*, 544 N.W.2d at 268 (noting factors to consider are age, education, training, intelligence and physical impairment). Rogers, a vocational rehabilitation expert, concluded that “the quality, quantity, and dependability of the work she can perform is so limited that there is no reasonably stable market for her services.” Although Bluffs Run Casino presented evidence from another vocational rehabilitation expert who disagreed with Rogers’ conclusions, it is the commissioner’s duty to weigh the evidence presented at the arbitration hearing. See *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001) (noting we give deference to the commissioner’s findings of fact). Upon a review of the record, we find there is substantial evidence to support the commissioner’s decision.

#### ***IV. Conclusion.***

We affirm the decisions of the district court and the workers’ compensation commissioner.

**AFFIRMED.**