IN THE COURT OF APPEALS OF IOWA

No. 7-825 / 06-1437
Filed January 16, 2008

CARLA VINSAND,
Petitioner-Appellant,

vs.

ELECTROLUX HOME PRODUCTS,
Respondent-Appellee.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

An employee appeals the district court decision affirming the award of benefits by the workers' compensation commissioner. **AFFIRMED.**

Janece Valentine of Valentine Law Office, P.C., Fort Dodge, for appellant.

William Timothy Wegman and Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron & Wegman, L.L.P., Des Moines, for appellee.

Considered by Sackett, C.J., and Baker, J., and Robinson, S.J.*

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

ROBINSON, S.J.

I. Background Facts & Proceedings

Carla Vinsand is employed by Electrolux Home Products. She works on a production line manufacturing clothes dryers. Vinsand injured her left shoulder at Electrolux on April 9, 2000. She had surgery six months later to resolve an impingement syndrome and a tendon tear. Vinsand experienced pain in her right shoulder in February 2001 which required surgery in May 2001. Dr. Robert Breedlove restricted Vinsand to lifting no more than five pounds and performing no work above her head. Vinsand was given a medical placement within the plant. She cannot be removed from her position unless she has less seniority than other employees needing a medical placement. Vinsand is in the top twenty-five percent in seniority in the plant.

Vinsand filed a claim for workers' compensation benefits. After an administrative hearing, a deputy workers' compensation commissioner determined she had an industrial disability of twenty-five percent for her left shoulder, and fifty percent for her right shoulder. This gave Vinsand a total disability rating of seventy-five percent.

The workers' compensation commissioner reduced the industrial disability rating for the right-shoulder injury to fifteen percent. The commissioner found the five-pound lifting restriction "was imposed for claimant's comfort rather than as a medical necessity." The commissioner noted Vinsand had a medical placement after the left-shoulder injury, and returned to that job after treatment to her right shoulder. Under the commissioner's decision Vinsand's total disability rating was

only forty percent. On judicial review the district court affirmed the decision of the commissioner. Vinsand appeals the commissioner's decision reducing her total disability rating from seventy-five percent to forty percent.

II. Standard of Review

Our review is governed by the 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 action 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

A. Vinsand contends the commissioner improperly considered the employer's accommodation of her restrictions in determining the amount of her industrial disability rating. On the issue of accommodation, the supreme court has stated:

> We think 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. To qualify as discernible, it must appear that the new job is not just "make work" provided by the employer, but is also available to the injured worker in the competitive market.

Murillo v. Blackhawk Foundry, 571 N.W.2d 16, 18 (Iowa 1997). If an employee's job is not available in the general labor market, the employee's industrial disability must be determined without regard to any accommodation furnished by the employer. *Ellingson v. Fleetguard, Inc.*, 599 N.W.2d 440, 445 (Iowa 1999).

The purpose of the accommodation rule is to "properly measure the extent of industrial disability suffered by a worker." *Excel Corp. v. Smithart*, 654 N.W.2d 891, 901 (Iowa 2002).

The decision of the commissioner shows the commissioner cited the correct rule concerning accommodation, and appropriately applied it. The commissioner found Vinsand was performing a regular job that would otherwise be performed by another employee. The commissioner further noted Vinsand's five-pound lifting restriction "precludes claimant from a sizable portion of the jobs in the competitive labor market as seen in other cases." The commissioner did not reduce the industrial disability award for the right-shoulder injury based on an improper interpretation of the accommodation rule.

B. Vinsand claims the commissioner improperly found that because she did not have a reduction in actual earnings, she did not have any disability. "Industrial disability measures an employee's lost earning capacity." *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 265 (Iowa 1995). In making the determination of industrial disability, the commissioner considers several factors, including the employee's functional impairment, age, education, intelligence, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining. *Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 673 (Iowa 2005).

A showing that an employee's actual earnings have decreased is not always necessary to support a conclusion there has been a reduction in earning capacity. *Clark v. Vicorp Restaurants, Inc.*, 696 N.W.2d 596, 605 (Iowa 2005);

St. Luke's Hosp. v. Gray, 604 N.W.2d 646, 653 (Iowa 2000). The commissioner considers several factors in determining an employee's industrial disability, and a comparison of earnings before and after the injury is one factor that may be considered. *Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 206 (Iowa 2005).

In determining Vinsand's industrial disability for the right-shoulder injury was fifteen percent, instead of fifty percent, the commissioner made the following findings:

> [T]here are three very influential factors that affect the degree of disability. Those are activity restrictions, qualifications for work that complies with the restrictions, impairment ratings and change in actual earnings. The restrictions and claimant's lack of skills for work that does not require physical labor indicate a major degree of disability. The physical impairment ratings indicate mild to moderate disability. The lack of change in actual earnings indicates no disability. The indicators are inconsistent. I consider restrictions to be important because restrictions directly impact a person's ability to obtain and perform jobs. In this case, the level of restrictions convinces me that a moderate disability exists.

The commissioner properly considered Vinsand's actual earnings before and after the injury as one factor in determining her industrial disability. *See id.* ("[A] comparison of actual earnings before and after the injury is also significant."). The commissioner did not rely on this factor alone, but considered several other factors in determining Vinsand's lost earning capacity. We conclude the commissioner did not err by considering whether Vinsand had a reduction in actual earnings.

C. Finally, Vinsand asserts the commissioner's findings of fact are so illogical as to render the commissioner's decision wholly irrational. An agency's

decision may be reversed if it is "[t]he product of reasoning that is so illogical as to render it wholly irrational." Iowa Code § 17A.19(10)(i). Furthermore, the agency's interpretation or application of a law that has clearly been vested by a provision of the law in the discretion of the agency may be reversed if it is "irrational, illogical, or wholly unjustifiable." *See* Iowa Code § 17A.19(10)(*l*), (m).

The commissioner explained his reasoning in determining Vinsand's industrial disability for the second injury, to the right shoulder, should be fifteen percent. We have outlined those findings above. Our review of the commissioner's decision shows the commissioner's factual findings are supported by substantial evidence and are neither illogical nor irrational.

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

AFFIRMED.

Sackett, C.J., and Robinson, S.J. concur. Baker, J. dissents.

Baker, J. (dissenting)

I respectfully dissent. The majority properly cites *Murillo v. Blackhawk Foundry*, 571 N.W.2d 16 (Iowa 1997) and the test contained therein regarding accommodation. It then finds that the commissioner cited the proper test and properly applied it. I disagree. *Murillo* is never cited by the commissioner, nor were the proper findings made. The majority notes that the commissioner found Vinsand was performing a regular job that would otherwise be performed by another employee *at that plant*, but did not make any findings that such a job (putting two screws into a dryer door) is available to the injured worker in the competitive market. That a job is available with the employer is not the salient question; the issue is whether the employee's abilities are "transferable to the competitive job market." *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 220 (Iowa 2004).

Because the *Murillo* test was not used and because no findings were made applying that test, I would remand this case for further findings on that issue. In *Murillo*, a similar situation arose:

> There is no indication in the record here that core cleaner positions are available in the labor market, or that Murillo's pay was comparable to that of other core cleaners. In short, the record is inadequate for determining the issue. It then becomes necessary to settle the upshot of the record's deficiency.
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> When there has been a failure of a required record, we frequently must decide whether it is appropriate to remand a case in order to supply the missing record. The answer most often is no; in view of limited judicial resources, we can ordinarily accord but one trial for each controversy. So the common practice is to resolve the matter against the party bearing the burden of proof. There is however a special rule in administrative appeals. Under Iowa Code section 17A.19(7), a record for additional evidence is not appropriate unless there were "good reasons" for the failed

> showing. *Heidemann v. Sweitzer*, 375 N.W.2d 665, 670 (Iowa 1985).

Murillo, 571 N.W.2d at 19.

I would remand for additional findings applying the proper test and assessment of industrial disability in light of those findings.