

IN THE COURT OF APPEALS OF IOWA

No. 7-970 / 07-1015
Filed January 30, 2008

**WEST SIDE TRANSPORT, INC. and
ROYAL & SUN ALLIANCE,**
Petitioners-Appellants,

vs.

REX FISHEL,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Douglas S. Russell,
Judge.

An employer and its insurance carrier appeal from the district court's order affirming the Iowa Workers' Compensation Commissioner's decision awarding an employee permanent total disability benefits in a review-reopening proceeding.

AFFIRMED.

Charles A. Blades of Scheldrup Blades Schrock Sand Aranza P.C., Cedar Rapids, for appellants.

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

Heard by Huitink, P.J., and Zimmer and Miller, JJ.

HUITINK, P.J.

An employer and its insurance carrier appeal from the district court's order affirming the Iowa Workers' Compensation Commissioner's decision awarding an employee permanent total disability benefits in a review-reopening proceeding. We affirm.

I. Background Facts

At the time of the review-reopening hearing, Rex Fishel was fifty years old. He had completed only the ninth grade but later obtained his GED. Because he was frequently absent from school to work on the family farm, he is limited to reading at the fifth grade level, mathematics at the fourth grade level, and written language at the third grade level. His IQ is seventy-eight, which is in the modest borderline range of mental ability development. Since he was sixteen years old, he has been a right-hand dominant mechanic for various employers. In addition, Fishel has a federal felony conviction and fourteen OWI convictions.

On September 28, 1994, while working as a mechanic for West Side Transport, Inc., Fishel sustained a work-related injury when the rear end of a truck fell on his chest and right shoulder. After several weeks of temporary disability, Fishel returned to work as a truck washer.

On January 27, 1996, Fishel sustained a non-work related injury when he slipped and fell on ice while moving furniture. He tore his left rotator cuff and had surgery in February 1996. While undergoing treatment for the injury to his left shoulder, Fishel did not return to work and complained of pain in his right shoulder. Fishel's doctors discovered a tear in his right rotator cuff. In May 1996 Fishel had surgery to repair this tear. Fishel subsequently retore it three times,

necessitating surgeries in October 1996, June 1997, and December 1997. After the last surgery, West Side Transport terminated Fishel's employment, and Fishel again retore his right rotator cuff. Fishel's doctors do not recommend further surgical intervention. Fishel reached maximum medical improvement on November 9, 1999.

Fishel underwent two functional capacity evaluations in 1999 and 2004. The first evaluation done by Dr. McMains determined Fishel can work at the medium physical demand level with the following restrictions:

[W]ith movement away from the body, the right arm has no strength and no ability to reach upward or away. Part of the lack of ability is the worker's fear of re-injury, which is probably realistic based on his history. The general rule is that anyone who's had a rotator cuff repair, even with good outcome, should be restricted to working below shoulder height. That goes for Mr. Fishel as well. . . . [He should] keep the [right] elbow at the side at all times. . . . The prognosis is extremely guarded because of the past history of repeated tears of the right shoulder, even with minimal activity such as walking.

The evaluation rated Fishel's permanent partial disability for his right shoulder at fifteen percent of the body as a whole. The second evaluation done by Dr. McMains determined Fishel can work at the medium physical demand level with no lifting above chest height and rated Fishel's permanent partial disability for his right shoulder at sixteen percent of the body as a whole and left shoulder at four percent of the body as a whole.

Before and after Fishel was terminated from West Side Transport's employ, he applied at various places of employment. He was eventually hired by McDonald's in 2003 as a part-time cook. He ended up quitting the job because the pain in his arms interfered with his sleep.

West Side Transport employed two vocational consultants in 2004. Its first consultant, Shannon Ford, reported Fishel's "job opportunities are quite few given his current restrictions, work history and educational background." West Side Transport terminated Ford's services and hired Candice Kaelber. Kaelber identified forty-eight employers who had job listings consistent with Fishel's background and physical restrictions. However, Fishel refused to cooperate with Kaelber upon the advice of counsel because of concerns that this abrupt change was motivated by tactical reasons.

Fishel also met with vocational counselors at Kirkwood Community College but was not interested in any of the job training services offered because of his physical restrictions, mental limitations, loss of identity as a mechanic, fear that he would further injure himself, and criminal record. When vocational counselor Sandy Taylor entered Fishel's physical restrictions and mental limitations in a career database, she could not find any careers. Taylor eventually closed Fishel's case.

Currently, Fishel works as a self-employed mechanic working thirty hours per month and earning \$200 per month. He has a hoist set up in his garage so he can work on transmissions and engines for his friend. He is able to work less than an hour at a time before taking a half-hour break.

II. Prior Proceedings

Fishel filed a contested case proceeding against West Side Transport and its insurance carrier, alleging the right shoulder condition was caused by the 1994 work-related injury. A contested case hearing was held. On August 26, 1998, the deputy workers' compensation commissioner issued his arbitration

decision awarding Fishel temporary partial disability benefits because a causal connection existed between his right shoulder condition and the 1994 work-related injury.¹ West Side Transport appealed to the workers' compensation commissioner. On October 6, 1999, the commissioner affirmed. West Side Transport filed a petition for judicial review in the district court. On October 8, 2001, the district court affirmed. West Side Transport appealed to our court, and we affirmed. See *West Side Transp., Inc. v. Fishel*, No. 02-0092 (Iowa Ct. App. July 10, 2003).

On January 14, 2004, Fishel filed a petition for review-reopening pursuant to Iowa Code section 86.14(2) (2003). A second contested case hearing was held on the issue of the extent of Fishel's disability for the right shoulder injury and apportionment of the left shoulder injury. On January 20, 2006, the deputy commissioner issued his review-reopening decision converting Fishel's healing period benefits into permanent total disability benefits and finding these benefits are not subject to apportionment. West Side Transport appealed to the commissioner. On December 12, 2006, the commissioner affirmed, adopting the deputy commissioner's findings and making an additional finding that Fishel is an odd-lot employee. West Side Transport filed a petition for judicial review in the district court. On May 8, 2007, the district court affirmed. The district court found substantial evidence existed to support the commissioner's finding that Fishel was permanently totally disabled and was an odd-lot employee. It also found the apportionment rule does not apply when one is permanently totally disabled.

¹ Notably, on March 24, 1998, Fishel was awarded supplemental security income for the injuries to both of his shoulders.

On appeal, West Side Transport claims:

- A. THE AGENCY DECISION MUST BE REVERSED BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THAT THE RIGHT SHOULDER INJURY AND OTHER PROPERLY CONSIDERED INDUSTRIAL DISABILITY FACTORS ARE A PROXIMATE CAUSE OF TOTAL DISABILITY
- B. THE CLAIMANT IS NOT TOTALLY DISABLED UNDER THE “ODD-LOT” DOCTRINE AS A MATTER OF LAW
- C. CLAIMANT HAS DISABILITY FROM HIS NON-WORK RELATED LEFT SHOULDER INJURY THAT SHOULD BE APPORTIONED OUT OF HIS WORK-RELATED PERMANENT PARTIAL DISABILITY

III. Standard of Review

Our review of a final decision of the commissioner, like that of the district court, is for correction of errors of law. *Second Injury Fund 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) to the agency’s 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). The agency’s findings are akin to a jury verdict, and we broadly apply them to uphold the agency’s decision. *Shank*, 516 N.W.2d at 812.

We will uphold the agency’s action against a claim it is unsupported by substantial evidence in the record made before the agency when the record is viewed as a whole if a reasonable person could accept the evidence as adequate to reach the findings made by the agency.² Iowa Code § 17A.19(10)(f); *Pointer v. Iowa Dep’t of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996).

² Besides substantial evidence, West Side Transport also claims the commissioner’s decision is based on an erroneous interpretation of law. See Iowa Code §

[E]vidence is not insubstantial merely because it would have supported contrary inferences. Nor is evidence insubstantial because of the possibility of drawing two inconsistent conclusions from it. The ultimate question is not whether the evidence supports a different finding but whether the evidence supports the findings actually made.

City of Hampton v. Iowa Civil Rights Comm'n, 554 N.W.2d 532, 536 (Iowa 1996).

Therefore, if the agency's findings of fact are supported by substantial evidence, those findings are binding on us. *Id.*

IV. Permanent Total Disability

Although West Side Transport phrases its first assignment of error in terms of causation, its claim is really about the extent of Fishel's industrial disability. Stated another way, West Side Transport argues substantial evidence does not exist to support a finding of total industrial disability.

Pursuant to section 85.34(3), the commissioner may award permanent total disability benefits. Total industrial disability occurs when an injury "wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to perform." *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 633 (Iowa 2000). "Total disability does not require a state of absolute helplessness." *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 219 (Iowa 2004). The issue is whether "there [are]

17A.19(10)(c). Upon reviewing its brief, we find West Side Transport has delineated no such errors. Therefore, review under this standard is not applicable. Moreover, West Side Transport claims the commissioner's decision is based upon an irrational, illogical, or wholly unjustified application of law to the facts. See *id.* § 17A.19(10)(m). Because we find substantial evidence supports the commissioner's decision, the commissioner did not commit error in applying the law to the facts. See *Pirelli-Armstrong Tire Co. v. Reynolds*, 562 N.W.2d 433, 436-37 (Iowa 1997) (finding substantial evidence without addressing errors in applying the law to the facts). Finally, West Side Transport claims the commissioner's decision is otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. Iowa Code § 17A.19(10)(n). We will address this claim briefly below.

jobs in the community the employee can do for which the employee can realistically compete.” *Shank*, 516 N.W.2d at 815.

Industrial disability means reduced earning capacity. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 192 (Iowa 1980). Many factors are considered in determining industrial disability. *Hartman v. Clarke County Homemakers*, 520 N.W.2d 323, 329 (Iowa Ct. App. 1994). Bodily impairment is one factor. *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 495 (Iowa 2003). Others include the employee’s age, intelligence, education, qualifications, experience, and the injury’s effect on the employee’s ability to find suitable work. *Id.* “Thus, the focus is not solely on what the worker can and cannot do; the focus is on the ability of the worker to be gainfully employed.” *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 266 (Iowa 1996). “When the combination of factors precludes a worker from obtaining regular employment to earn a living, the worker with only a partial functional disability has a total industrial disability.” *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 103 (Iowa 1985).

The commissioner’s findings provide:

Fishel is not well motivated to return to competitive employment and is currently performing some work within his area of expertise on a self-employed basis. Nonetheless, after four surgeries he is left with an unrepairable dominant right shoulder and significant work restrictions as outlined by Dr. McMains following two valid functional capacity evaluations. Fishel’s age, limited education and limited intelligence all indicate that substantial vocational training is unlikely in this case, and it is highly improbable that he can return to full-time employment as an automotive mechanic even without considering his left shoulder injury or criminal history. He is found incapable of performing a sufficient quantity and quality of work in a well-established branch of the labor market so as to retain a position in competitive employment and become self-supporting, and is therefore entitled to permanent total disability benefits during such time as he

remains under a total industrial disability. Fishel's running healing period shall be converted to permanent total disability.

Similarly, the district court stated:

The Court does not believe that the Commissioner's finding, that Fishel has a total and permanent disability is against the weight of the evidence presented. While the Court believes that the Commissioner could have found for West Side Transport based on its arguments that tend to . . . show that Fishel was unmotivated in his job search, the Court cannot say that because the Commissioner reached the opposite conclusions, that the Commissioner's finding was against the weight of the evidence.

The Commissioner, upon reviewing all of the evidence on the record, ultimately found that Fishel's injury, coupled with his age, education, work experience and ability outweighed Fishel's attempts, or non-attempts as the case may be, to secure alternative employment. The record supports the finding of fact that Fishel, given his situation, would have a very difficult time securing gainful employment. While Fishel may have been reluctant to be retrained in other areas, the Commissioner did not find that Fishel's lack of motivation was a significant enough factor to find that Fishel was not permanently and totally disabled. The Court finds that the record contains adequate evidence to find that Fishel was totally and permanently disabled, even in the face of evidence of his lack of motivation in looking for new employment.

Our review of the record confirms the nature and substance of the evidence cited in the commissioner's findings of fact. Like the trial court, we conclude substantial evidence supports the commissioner's resulting decision awarding Fishel permanent total disability benefits.

Nonetheless, West Side Transport argues: (1) The commissioner abused his discretion in disregarding Dr. McMains's uncontroverted opinion; (2) the commissioner considered inappropriate factors in determining industrial disability, namely Fishel's criminal history, left shoulder injury, and lack of motivation to find employment; (3) substantial evidence does not support the commissioner's finding that Fishel cannot likely be retrained; and (4) substantial evidence does

not support the commissioner's finding that West Side Transport refused to return Fishel to work. We will briefly address these contentions.

First, even if a medical opinion is uncontroverted, it "is not binding on the trier of fact" and "may be accepted in whole, in part, or not at all." *Wilson-Sinclair Co. v. Griggs*, 211 N.W.2d 133, 142 (Iowa 1973). Also, bodily impairment is merely one factor to consider in determining industrial disability. See *Wal-Mart Stores, Inc.*, 657 N.W.2d at 495. Therefore, the commissioner did not abuse his discretion. See Iowa Code § 17A.19(10)(n). Second, the commissioner did not consider Fishel's criminal history or left shoulder injury in determining industrial disability. In addition, the commissioner properly considered Fishel's motivation to find work in determining industrial disability. See *IBP, Inc.*, 604 N.W.2d at 633 (stating motivation is a permissible factor). Third, as we found above, substantial evidence supports the commissioner's finding that Fishel cannot likely be retrained. Fourth, the commissioner's finding that West Side Transport refused to return Fishel to work pertains to the odd-lot doctrine, which is another theory of determining whether an employee is permanently totally disabled. See *Michael Eberhart Constr. v. Curtin*, 674 N.W.2d 123, 126 (Iowa 2004) (stating an employee may establish permanent total disability in one of two ways—under the industrial disability method or the odd-lot doctrine). Because we found substantial evidence supports the award of permanent total disability benefits based on the theory of industrial disability, it is unnecessary to address the odd-lot doctrine.

V. Apportionment

Lastly, West Side Transport claims Fishel's non-work related left shoulder injury should be apportioned out of his work-related permanent partial disability. The apportionment rule only applies to "those situations where *a prior injury or illness, unrelated to the employment*, independently produces some ascertainable portion of the ultimate industrial disability which exists following the employment-related aggravation." *Varied Enters., Inc. v. Sumner*, 353 N.W.2d 407, 411 (Iowa 1984), *overruled on other grounds by P.D.S.I. v. Peterson*, 685 N.W.2d 627, 630 (Iowa 2004) (emphasis added). Because the prior injury was work-related, the apportionment rule does not apply.

We accordingly affirm the district court's order affirming the commissioner's decision awarding Fishel permanent total disability benefits.

AFFIRMED.