IN THE COURT OF APPEALS OF IOWA

No. 8-304 / 06-2078
Filed October 1, 2008

THOMAS MILLENKAMP,
Petitioner-Appellant/Cross-Appellee,

vs.

MILLENKAMP CATTLE CO. and
ALLIED INSURANCE,
Respondents-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Polk County, Darrell J. Goodhue, Judge.

Appeal from judicial review of the denial of certain workers' compensation benefits. **AFFIRMED IN PART AND REVERSED IN PART.**

W. Dennis Currell of Currell Law Office, and Ronald Ricklefs, Cedar Rapids, for appellant.

William Grell of Huber, Book, Cortese, Happe & Lanz, P.L.C., West Des Moines, for appellees.

Heard by Sackett, C.J., and Miller and Potterfield, JJ.

SACKETT, C.J.

Thomas Millenkamp appeals from a district court decision affirming a finding by the Iowa Workers' Compensation Commissioner that he suffered a sixty percent industrial disability as the result of a work-related accident. Thomas contends the agency erred in not finding him to be permanently and totally disabled or in not applying the odd-lot doctrine, and in denying him temporary disability benefits and a penalty for the failure to pay benefits timely. Millenkamp Cattle Company (Company) and its insurer Allied Insurance cross-appeal, contending the district court erred in remanding a temporary disability issue to the agency. We affirm in part and reverse in part.

BACKGROUND. Thomas, born in 1944, is an employee of the Company and owns eighty percent of its stock. In February of 2001 he was being treated for bladder cancer. On the 24th of that month he was working for the Company as a cattle buyer and farm manager when, while loading cattle, a cow kicked him in the face. He was knocked down, struck his head on cement, and temporarily lost consciousness. Thomas was taken to a Dubuque hospital where he exhibited some memory loss and was treated and released. Subsequent problems arose, and on March 14, 2001, Thomas was diagnosed with post-concussion syndrome without any cognitive deficits and authorized to return to sedentary work, although he had already resumed certain work-related duties with the Company.

On June 4, 2001, Thomas reported his previous symptoms had subsided but he had memory problems. Thomas consulted Dr. Sterrett, a board-certified neurologist and Thomas's authorized treating physician during the course of his

treatment, who diagnosed post-concussive syndrome. He continued to complain of problems with his memory, neck pain, and headaches.

On August 22, 2001, Thomas again saw Dr. Sterrett, reporting he had lost his direction on a country road in Wisconsin while buying cattle and called his wife and was re-directed. On another occasion he was driving and did not remember where he was. Dr. Sterrett noted that otherwise Thomas is doing fine with his job selling cattle and going to various farms without difficulty. Thomas also complained of a floater in his eye as well as not sleeping well. Dr. Sterrett determined "post-concussion syndrome from the fall in February with memory difficulties, headaches related to the trauma, and facial pain related to the fall." He opined that Thomas had memory and directional difficulties, but he was improving and was almost normal.

By September 5, 2001, Dr. Sterrett found Thomas to be at maximum medical improvement, although Thomas still experienced some memory loss.

On April 22, 2002, Thomas returned to Dr. Sterrett for an impairment evaluation. Thomas was again found to be at maximum medical improvement and was given a zero permanent partial impairment rating. Dr. Sterrett found Thomas had no neurological impairment. He noted Thomas reported his memory loss was minimal as was his insomnia. Dr. Sterrett also noted Thomas had an issue with mandible pain on the left side, but opined this was not a neurological issue.

In May of 2002 Thomas was hunting mushrooms when he blacked out for thirty to forty minutes.[1] Following this incident Thomas began to have problems that he was to claim were related to the work injury.[2] He consulted, as discussed below, a number of medical doctors and other professionals who evaluated his condition and rendered differing opinions as to his injury, disability, and its cause. He saw Dr. Sterrett on June 18 and said his memory problems had returned. Dr. Sterrett did not feel the problems were related to the work injury because of the lapse of time. An MRI and EEG both were normal.

On July 2, 2002, Thomas was evaluated by Gerald Jorgensen, Ph.D., a psychologist. Jorgensen opined his testing found Thomas in the average range of intellectual functioning at the sixty-third percentile, but Jorgensen found Thomas did have obvious cognitive deficiencies, or impairment that was highly verbal. Jorgensen did attach some clinical significance to this discrepancy and found it consistent with a traumatic brain injury that occurs to the lower posterior region of the brain. Jorgenson concluded claimant was functioning in the average range of intellectual ability or functioning, but he could not tell how this compared with claimant's prior functioning before the head injury. Jorgensen noted that while he found such loss was common with a head injury, the loss could not be as clinically significant as in some other cases because Thomas was still functioning in the average range of ability and was still able to function in a rather normal manner.

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[1] Evidence at the hearing before the agency was that Thomas told several parties his memory problems began after this incident.

[2] The agency found the preponderance of the evidence pointed to the work-related injury as a cause of the subsequent problems and this finding is not challenged on appeal.

R.D. Jones, Ph.D., Associate Professor of Clinical Neurology at the University of Iowa College of Medicine, assessed Thomas on May 6, 2003. Jones found Thomas to be alert and fully-oriented to time, personal information, and place. He noted Thomas's speech was goal directed and logical with no evidence of "tangentiality or circumstantiality." He found Thomas's eye contact good, saw no evidence of psychomotor agitation or retardation, and noted Thomas's fluency, articulation, prosody, and comprehension were normal. No paraphasic errors were noted at any time during the examination. In a report dated December 23, 2003, Jones noted that Thomas

> may have had a concussion on 2/24/01. However, it is not possible to ascribe his current cognitive weaknesses to head trauma or a post concussive syndrome. Records clearly reflect that this was initially a mild syndrome at most, given that he was fully oriented shortly after the event, and responsive to initial medical providers. Furthermore, records reflect that he recovered over the ensuing months, as would be expected in the setting of mild concussion. . . . Such a relapse [at the time of the mushroom hunting] is not consistent with a post concussive syndrome. . . . [O]ther features of [Thomas's] history do not support a connection between his complaints of cognitive impairments and the 2/01 trauma, including his report that his cognition is declining, neuroimaging studies have been insistently normal, he has had normal neurologic exams, and an EEG study was reportedly normal.

Jones noted Thomas had symptoms of depression and that there was suggestion of limited motivation in their assessment and these factors may help to explain both Thomas's concerns and his neuropsychological profile.

On June 7, 2003, Matthew Rizzo, M.D., did a neurological summary of Thomas. He determined Thomas had a closed head injury with a concussion that showed the normal pattern of recovery. He opined that his findings did not support a finding Thomas suffered a traumatic brain injury on February 24, 2001. He found that despite current memory complaints, Thomas shows cognitive

performance in the average range of neuropsychological tests. Thomas was diagnosed with depression, which Rizzo said might be a factor in his current complaints, noting psychosocial factors may be contributing as Thomas's business was not good and the economic climate was poor. Rizzo also noted that Thomas was losing money and was diagnosed with bladder cancer in January 2001 just before his encounter with the cow. He opined that Thomas does not have a traumatic brain injury and he should be encouraged to pursue his desired activities to the fullest possible extent.

Thomas Sannito, Ph.D., a clinical psychologist, in a December 26, 2003 report opined that:

> Thomas is suffering from an Adjustment Disorder, Depressed Type. This syndrome occurs to well-adjusted people, who are confronted with a life situation that overwhelms them. They are unable to cope effectively with the stressful changes that have taken place in their life. In Thomas's case, he has had difficulty adapting to the intellectual and cognitive changes caused by the accident of February 4, 2001. He cannot function at the high level that he once did, and he has been unable to accept his limitations. Consequently, he gets depressed, anxious, frustrated, angry, antisocial, distrustful and demoralized.

On May 31, 2004, vocational consultant Barbara Laughlin determined Thomas to be 100 percent precluded from the competitive labor market and opined she did not believe there is a competitive labor market in any quality, quantity, or dependability available to Thomas. She noted her opinion concerned vocational loss and not industrial disability as that is in the sole purview of the industrial commissioner. She confirmed this position in a report made on September 28, 2004.

On September 21, 2004, Glenn F. Haban, Ph.D., neuropsychologist, after giving Thomas a battery of tests, reported that Thomas said he was ninety-five

percent improved at time of the mushroom picking incident, but Haban believed Thomas to be under-reporting symptoms. Haban found Thomas to have average intelligence with significant advantage for performance of intelligence tasks. Haban further found Thomas's verbal memory skills average to low average and his visual-spatial memory low average to impaired. He opined that Thomas was also impaired for incidental memory. On September 21, 2004, Haban opined that Thomas suffered a traumatic brain injury from being kicked in the head by a cow and he continues to have cognitive impairment due to that injury that affects his work, social, and leisure activities.

The matter came on for hearing before a deputy commissioner, who carefully reviewed the evidence and found "the claimant [Thomas], as a result of a February 24, 2001 work injury has suffered a traumatic brain injury with resulting cognitive deficits, memory loss, and other symptoms." The deputy found Thomas had a sixty percent industrial disability, was entitled to 300 weeks of permanent partial disability benefits, denied his claim for disability benefits, and found him not to be an odd-lot employee. On rehearing the deputy made some minor changes to his decision. The deputy's decision was adopted by the commissioner as the final agency decision.

On judicial review, the district court affirmed the agency finding that the February 24, 2001 injury was the proximate cause of Thomas's disability and that he suffered a sixty percent permanent industrial disability. The court also found substantial evidence supported the finding Thomas was not an odd-lot employee. The court noted there was an issue of whether temporary disability benefits were before it and determined it should consider them. The court found the arbitration

decision on the issue inconsistent and remanded for reconsideration of the denial of temporary partial benefits.

SCOPE OF REVIEW. Our review is governed by Iowa Code chapter 17A. *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007); *see Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 498 (Iowa 2003). We apply the standards of section 17A.19(10) to the agency's decision and decide whether the district court correctly applied the law in exercising its judicial review function. *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 286-87 (Iowa 2001). We apply the standards of the Administrative Procedure Act to the agency action to determine if our conclusions are the same as those reached by the district court. *Ayers v. D & N Fence Co.*, 731 N.W.2d 11, 16 (Iowa 2007), *Univ. of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

The Iowa Administrative Procedure Act provides fourteen grounds upon which a reviewing court may reverse the decision of the workers' compensation commissioner. Iowa Code § 17A.19(10). While not clearly articulated by the appellant, we determine the relevant ground for this appeal on the issues of total disability and odd-lot-employee status are that the agency action is not supported by substantial evidence. *Id*. § 17A.19(10)(f) (stating a decision of the commissioner is supported by substantial evidence if the evidence is of the "quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance"). We may reverse the agency's findings only if they are not supported by substantial evidence in the record. *Waters*, 674

N.W.2d at 95; Iowa Code § 17A.19(10)(f)(1). Credibility and demeanor observation and findings are best left to the presiding deputy commissioner. *See* Iowa Code § 17A.15(2), *Clark v. Iowa Dep't of Revenue & Fin.*, 644 N.W.2d 310, 315 (Iowa 2002).

TOTAL DISABILITY. Thomas contends the district court erred in finding there was substantial evidence to support the sixty percent permanent industrial disability benefits the commissioner awarded him. He argues the district court did not assess all of the evidence in arriving at this conclusion. Thomas contends on our review of the evidence we must find him to be 100 percent disabled.

In determining the extent of Thomas's industrial disability, the question is "the extent to which the injury reduced his earning capacity." *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 104 (Iowa 1985). This inquiry cannot be answered merely by exploring the limitations on his ability to perform physical activity associated with employment, but requires consideration of all the factors that bear on his actual employability. *Id.*

The matters to be considered in this regard include age, education, qualification, experience, and inability due to injury to engage in the employment for which the claimant is fitted. *Id.*; *Doerfer Div. of CCA v. Nicol*, 359 N.W.2d 428, 438 (Iowa 1984). Our consideration of the evidence and these factors causes us to find that the percentage of disability determined by the commissioner is supported by substantial evidence and should be affirmed.

In arriving at this conclusion we look to Dr. Kitchell's opinion that Thomas's February 2001 head injury did not leave him with any major neurologic

sequelae, Dr. Sterrett's August 22, 2001 report that Thomas was improving and was almost normal, Dr. Rizzo's opinion that Thomas did not have a traumatic brain injury, and Dr. Jones's December 23, 2003 opinion that it is not possible to ascribe Thomas's complaints to head trauma or post-concussive syndrome. We also consider the deputy's findings as incorporated in the final agency decision that Thomas's demeanor at the hearing showed he was not incoherent, forgetful, or confused; that Thomas came across as an intelligent man who had a good command of himself; that Thomas remembered many details of his business and answered questions appropriately; that his demeanor at the hearing showed a man who still retains much of his lifelong intelligence and abilities; and that while he may have lost a portion of his business abilities, Thomas had not become mentally incompetent from his injury. We look at testimony from employees of the Company who testified that Thomas went back to work in some capacity and that Thomas was a smart man capable of making good decisions, even after the February 2001 injury. We look also to Thomas's admission he still did work on his farm that he used to pay others to do. We consider an employee's testimony that Thomas returned to his normal job shortly after the injury and was able to perform his regular duties at least through December 2003, when the employee was terminated. We agree with the district court there is substantial evidence to support the agency's findings as to the extent of Thomas's industrial disability. We affirm on this issue.

ODD-LOT. Thomas next contends the agency should have found him to be an odd-lot worker. Under the odd-lot doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment

in any well-known branch of the labor market. *Guyton*, 373 N.W.2d at 106. An odd-lot worker is totally disabled if the only services the worker can perform are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. *Id*.

If the evidence of the degree of obvious physical impairment, coupled with other facts such as claimant's mental capacity, education, training, or age places claimant prima facie in the odd-lot category, the burden is on the employer to show that some kind of suitable work is regularly and continuously available to the claimant. *Id.* at 105. "[W]hen a worker makes a prima facie case of total disability by producing substantial evidence that he or she is not employable in the competitive labor market, the burden to produce evidence of suitable employment shifts to the employer." *Id*. at 106. "If the employer fails to produce such evidence and the trier of fact finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability." *Id*. However, "the trier of fact is free to determine the weight and credibility of the evidence in determining whether the worker's burden of persuasion has been carried." *Id.* "Only in an exceptional case would evidence be sufficiently strong to compel a finding of total disability as a matter of law." *Id*. The agency did not find that Thomas made a prima facie case, noting there was little evidence Thomas could not do another job because he made absolutely no effort to explore other employment; rather, he was content to work at his old job for fewer hours.

The agency in his findings said "the fact Thomas is still working at his old job precludes a finding of permanent total disability under normal disability

analysis and he is not an odd-lot employee. There are jobs he could do in the labor market place."

Thomas disagrees, contending his lack of a broad range of work experience is a handicap and his age makes him less than an attractive candidate to potential employers. He argues the fact he only has a high school education further limits his opportunities.

There is evidence to support a finding that Thomas could do farm labor. He has no physical restrictions and was able to perform physical labor after the date of the injury. Furthermore, there is evidence that he is performing within the average range of intelligence and remains capable of operating simple machinery.

We have considered the evidence to the contrary; however, our role is not to substitute our findings or to review the contradictory evidence in the record to determine whether the agency could have drawn different conclusions or findings. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). We affirm on this issue.

PENALTY BENEFITS. Thomas contends he should have penalty benefits. The Company contends that error was not preserved on his claims for temporary disability or healing period benefits. From our review of the record before us, we conclude error was not preserved on this issue.

CROSS APPEAL. The Company on cross-appeal contends that Thomas failed to preserve error on any claim for temporary disability benefits before July 22, 2002, by not raising the claim on appeal to the commissioner and failing to raise the claim in his petition for judicial review or his principle judicial review

brief. The Company contends that the district court erred in remanding the temporary disability issue to the commissioner because error was not preserved and no such award is justified. The Company contends it preserved error by challenging whether Thomas had preserved this error at the district court level. It contends he asserted no such claim for temporary benefits prior to March 10, 2001, citing *McSpadden v. Big Ben Coal Co.*, 288N.W.2d 181, 184 (Iowa 1980). We agree. The district court decided to remand the issue based on tax returns that apparently were not submitted to the agency. Error was not preserved. We reverse that portion of the decision of the district court remanding this issue to the agency.

We affirm the district court in part and reverse in part. We affirm the decision of the agency in its entirety.

AFFIRMED IN PART AND REVERSED IN PART.