

IN THE COURT OF APPEALS OF IOWA

No. 8-473 / 07-1812
Filed August 13, 2008

JUDY KAY CECIL,
Respondent-Appellant,

vs.

EMC INSURANCE COMPANIES
and EMC RISK SERVICES,
Petitioners-Appellees.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

An injured employee appeals from the district court's ruling on judicial review reversing the workers' compensation commissioner's award of temporary partial disability and industrial disability benefits. **THE DISTRICT COURT'S DECISION ON JUDICIAL REVIEW IS REVERSED; THE DECISION OF THE COMMISSIONER IS AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.**

Martin Ozga of Max Schott and Associates, P.C., Des Moines, for appellant.

Dorothy L. Kelley, Des Moines, for appellees.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

An injured employee appeals from the district court's ruling on judicial review reversing the workers' compensation commissioner's award of temporary partial disability and industrial disability benefits. The district court's ruling on judicial review is reversed, and the decision of the workers' compensation commissioner is affirmed in part, reversed in part, and remanded with instructions.

I. Background Facts and Proceedings

Judy Cecil was employed by Employers Mutual Insurance Companies (EMC) as a medical case manager from April 27, 1998, to December 31, 2003. Her job involved daily travel for which she was assigned an employer-owned fleet or rental car. On November 17, 2003, Cecil submitted an employee injury report indicating she experienced various aches and pains attributable to driving company owned or rental cars during her five and one-half year employment at EMC. Cecil did not return to work after November 18 and, as noted earlier, left EMC on December 31, 2003. Within a month of her departure from EMC, Cecil began working part-time as a medical case manager at Stubbe & Associates, Inc.

On June 10, 2004, Cecil filed an original notice and petition with the workers' compensation commission. Cecil's alleged injury dates were February 17, 2003, and November 17, 2003. Cecil also alleged that she suffered a "cumulative injury to her hands, wrist, neck, and back from work activities driving company fleet and rental cars" with resulting disability from "02/17/03 to present and continuing."

The deputy workers' compensation commissioner who presided at the contested case proceeding concluded Cecil "sustained cumulative injury to her hands, wrists, and

neck which arose out of and in the course of her employment with EMC.” The presiding deputy, however, rejected Cecil’s claim that she sustained permanent, temporary, or industrial disabilities resulting from her earlier-described cumulative injury.

On appeal, the deputy authorized to make the final agency decision adopted some but not all of the presiding deputy’s findings and conclusions. The appeal decision includes the following:

As the presiding deputy made no reference to any impressions made from observations of the demeanor of any witness at hearing, I am not bound by the credibility assessments made by the presiding deputy.

The presiding deputy chose to ignore the claimant’s uncontroverted testimony at hearing that she many times asked EMC management to accommodate for the restrictions imposed by the treating authorized physician, shortly before she retired. These include requests to provide an ergonomically suitable car to drive and to limit work to three days per week. She states that EMC refused each time. These indeed were the restrictions of Dr. Prevo. Defendants offered no evidence that they accommodated for these restrictions. Claimant then sought and obtained part-time employment elsewhere that fit into Dr. Prevo’s restrictions. Although these restrictions were later lifted, claimant was unable to move to full-time work when that happened because her new employer does not have full-time work available to her and EMC has not offered to return claimant back to work. The presiding deputy then improperly concluded that claimant was not forced to leave EMC and that any financial loss claimant has sustained was her fault. This conclusion is clearly erroneous.

I agree with the presiding deputy that the cumulative trauma work injury of November 17, 2003, is not a cause of permanent physical impairment. However, due to EMC’s refusal to accommodate for her temporary restrictions, claimant was forced to transfer jobs and take retirement earlier from EMC than she had planned. In doing so, she lost insurance rights and pension income which she states is about \$400 less per month. I find these long lasting adverse financial impacts were the result of the cumulative trauma work injury of November 17, 2003. Again, this aspect was largely overlooked by the presiding deputy.

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I find that the work injury of November 17, 2003 is a cause of a 25 percent loss of earning capacity. This entitles claimant to 125 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u).

Iowa Code section 85.33(3) provides that if suitable work is not offered by the employer, and the employee elects to perform suitable work with a different employer, the employee shall be compensated with temporary partial disability benefits. Claimant provided calculations for this benefit which are likewise not contradicted in the record. Claimant is therefore entitled to such benefits.

EMC was therefore ordered to pay Cecil 125 weeks permanent partial disability benefits from May 8, 2004, the day the record indicates Cecil reached maximum medical improvement. EMC was also ordered to pay Cecil temporary partial disability benefits from January 1, 2004, through May 7, 2004.

On February 12, 2007, EMC filed a petition for judicial review. EMC alleged the appeal decision prejudiced its substantial rights and should be reviewed for the following reasons:

- A. The Decision of the Agency is in violation of constitutional or statutory provisions.
- B. The Decision of the Agency is based upon an erroneous interpretation of the law, and is contrary to law.
- C. The Decision of the Agency is unreasonable, arbitrary and capricious, and is a wholly unjustified application of the law.
- D. The Decision of the Agency is not supported by substantial evidence in the record when the record is viewed as a whole.

The trial court's October 11, 2007 ruling on EMC's petition for judicial review includes the following:

Cecil began formally working for Stubbe on January 1, 2004 and was not given work restrictions to drive her own car and only work 3 days a week by Dr. Prevo until January 5, 2004. Cecil did not have any physician-imposed restrictions when she filled out her workers' compensation employee injury report or when she gave her notice of retirement. Therefore, [the deputy's] factual determination that Cecil was forced to retire because EMC refused to accommodate her physician-imposed restrictions is erroneous and not supported by substantial evidence in the record.

On May 7, 2004, Dr. Prevo placed Cecil at maximum medical improvement and released her to work in a fully duty capacity as a

medical case manager. Cecil does not have any physician-imposed restrictions at present, and she testified that she is able to return to full-time work. Deputy Walshire appeared to base his industrial disability award on the fact that Cecil is actually earning less not because she accepted a part-time position with Stubbe and forfeited many of her retirement benefits with EMC, which is an erroneous interpretation of the law. Industrial disability is awarded on the basis of a loss in earning capacity, not on the loss of earnings that an injured employee will experience. *Second Injury Fund of Iowa*, 544 N.W.2d at 266 (citing *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 616-17 (Iowa 1995)).

Based on the industrial disability factors, Cecil's testimony, the medical records and opinions, and the fact that Cecil was released to work in a full-duty capacity as a medical case manager, the only reasonable determination is that Cecil does not have an industrial disability. Cecil's earning capacity has not been affected by this injury because she is capable of working full-time as a medical case manager with no restrictions, a job that she is more than qualified for and has significant experience in performing. Therefore, [the deputy's] conclusion that Cecil's injury resulted in a 25 percent loss of earning capacity entitling her to 125 weeks of permanent partial disability benefits is not supported by substantial evidence and constitutes a misapplication of the law to the facts in the record.

As previously discussed, the chronological facts do not support this determination. By the time that EMC would have been required to offer Cecil suitable work based on her physician-imposed restrictions, Cecil had already retired from EMC. Therefore, [the deputy's] determination that Cecil was entitled to temporary partial disability benefits is not supported by substantial evidence in the record and constitutes a misapplication of the law to the facts in the record.

The trial court accordingly reversed the deputy's decision awarding Cecil temporary partial disability benefits and industrial disability benefits.

On appeal, Cecil claims the commissioner's decision awarding industrial disability and temporary partial disability benefits is supported by substantial evidence.

II. 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) (2003) 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. Iowa Code § 17A.19(10)(f); *Pointer v. Iowa Dep't of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996).

Evidence 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.*

III. Credibility Findings

As a preliminary matter, we address EMC's argument that the commissioner erred in rejecting the deputy's credibility findings. The deputy's proposed findings are not a consideration on our review because its decision is not final agency action subject to judicial review. See *Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 358 (Iowa 1999).

In addition, the commissioner possesses discretion to accept or reject testimony based on credibility. See *Terwilliger v. Snap-on Tools Corp.*, 529 N.W.2d 267, 273 (Iowa 1995).

IV. Temporary Partial Disability

Under section 85.33(3), an employee is entitled to temporary partial disability benefits if the employee is temporarily partially disabled as defined in section 85.33(2) and “[i]f suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily disabled elects to perform work with a different employer. . . .” These benefits are paid until “the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.” Iowa Code § 85.33(1).

As noted earlier, the deputy commissioner found Cecil was subject to work restrictions while employed at EMC and obtained other suitable employment because EMC refused to accommodate those restrictions. Although the trial court concluded otherwise, our review of the record discloses conflicting but nevertheless substantial evidence supporting the deputy’s findings of fact. The relevant medical records and reports prepared by Cecil’s examining and treating physicians while she was still employed at EMC can be reasonably interpreted as imposing work restrictions including driving an ergonomically suitable automobile and limiting her work hours to three days per week. The same can be said of the evidence concerning EMC’s refusal to accommodate those restrictions as well as Cecil’s motives for obtaining other employment. Cecil testified EMC repeatedly refused her requests for appropriate

accommodations and she sought and accepted other employment compatible with the foregoing work restrictions as a result of EMC's refusal to accommodate her.

We also reject EMC's arguments concerning the amount of temporary partial disability benefits awarded. The record indicates the deputy's calculation of the amount of Cecil's weekly benefit was based on stipulated documentation of Cecil's earnings as well as her testimony concerning her work schedule. Although EMC cites evidence contradicting Cecil's claims concerning the number of hours she actually worked, our reading of the record indicates the deputy resolved the resulting factual issues in Cecil's favor and it is not for us to say otherwise.

We accordingly reverse the trial court and affirm the deputy's decision awarding Cecil temporary partial disability benefits.

V. Industrial Disability

Industrial disability means reduced earning capacity. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 192 (Iowa 1980). Many factors are considered, including bodily impairment, the employee's age, intelligence, education, qualifications, and experience, and the injury's effect on the employee's ability to find suitable work. *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 495 (Iowa 2003). The lack of an impairment rating is not determinative. *Trade Prof'ls, Inc. v. Shriver*, 661 N.W.2d 119, 123 (Iowa 2003); *Haynes v. Second Injury Fund*, 547 N.W.2d 11, 14 (Iowa Ct. App. 1996). Finally, "the level of post-injury earnings is important evidence of whether the injury impaired the worker's capacity to earn." *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 266 (Iowa 1995).

We agree with the trial court's conclusion that the deputy's award of industrial benefits solely based on Cecil's loss of earnings is an erroneous interpretation of the law. See *Second Injury Fund of Iowa*, 544 N.W.2d at 266. We, however, disagree with the trial court's conclusion that the only reasonable determination based on the record before us is that Cecil does not have an industrial disability. Under these circumstances, we believe the appropriate remedy is to set aside the commissioner's findings concerning Cecil's industrial disability, and remand to the commissioner for a redetermination of Cecil's industrial disability, if any, based on evidence of all of the foregoing factors disclosed by the record made in the original contested case proceeding. See, e.g., *Ellingson v. Fleetguard*, 599 N.W.2d 440, 445 (Iowa 1999).

The district court's ruling on judicial review is reversed, and the decision of the workers' compensation commissioner is affirmed in part, reversed in part, and remanded with instructions.

**THE DISTRICT COURT'S DECISION ON JUDICIAL REVIEW IS REVERSED;
THE DECISION OF THE COMMISSIONER IS AFFIRMED IN PART, REVERSED IN
PART, AND REMANDED WITH INSTRUCTIONS.**