IN THE COURT OF APPEALS OF IOWA

No. 8-496 / 08-0065
Filed August 13, 2008

JACOBSON TRANSPORTATION COMPANY
and LIBERTY MUTUAL INSURANCE,
Petitioners-Appellants,

vs.

RUSSELL HARRIS,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

The employer appeals from the ruling on judicial review from the award of workers' compensation benefits to its former employee. **AFFIRMED IN PART, REVERSED IN PART.**

Kevin Rogers of Swisher & Cohrt, P.L.C., Waterloo, for appellant.

Michael Mock of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Considered by Vogel, P.J., and Zimmer and Eisenhauer, JJ.

VOGEL, P.J.

Jacobson Trucking Company (Jacobson) and its insurance carrier, Liberty Mutual Insurance, appeal from the ruling on judicial review affirming the award of workers' compensation benefits to Russell Harris. We affirm in part and reverse in part.

Background Facts and Proceedings.

Harris, who was born in 1951, began working as an over-the-road truck driver for Jacobson in April of 2003. Prior to that time, his work history had mainly consisted of truck driving, heavy labor, maintenance, and construction labor. On December 9, 2003, Harris injured his back while unloading boxes. After reporting his injury to Jacobson the following day, Harris was referred to the company physician in Des Moines. At that time, he was diagnosed with lumbosacral and thoracic spine strains and was placed on light duty work until December 19. Harris continued to work fulltime driving truck for Jacobson until March of 2004.

During that time, Harris was being seen by his family physician, who performed a variety of spinal injections. The injections initially appeared to help but did not provide any long-lasting relief. He also underwent physical therapy without any lasting benefit. In July 2004, Harris was evaluated by neurosurgeon, Dr. Emily Friedman. After a series of appointments, Dr. Friedman eventually assigned Harris a fifteen percent functional impairment rating to the body as a whole for his low back condition, but apportioned five percent as preexisting and ten percent to the work injury. She recommended against surgery, but placed further restrictions on Harris as well as advised that he not return to driving truck.

In February 2005, Harris was seen by Dr. John Kuhnlein, an occupational health specialist, who largely concurred in Dr. Friedman's findings, including the recommendation that Harris not return to long-haul truck driving. A further evaluation by neurosurgeon Dr. Alexander L'Heureux, in September 2005 resulted in yet another opinion that Harris be limited to light duty work and avoid truck driving.

On March 23, 2005, Harris filed a workers' compensation petition. Following a hearing, the deputy issued an arbitration decision in which he found Harris to be permanently and totally disabled. He also found a weekly compensation rate of $483.99 to be appropriate. Jacobson appealed the disability finding and Harris cross-appealed the rate. In an appeal decision, the commissioner affirmed the disability finding but modified the weekly rate to $545.51. The district court affirmed on judicial review. Jacobson appeals from this ruling claiming (1) substantial evidence does not support the finding of permanent and total disability, and (2) the determination of the weekly compensation rate was erroneous and an abuse of discretion.

Scope and Standards of Review.

A district court reviews agency action pursuant to the Iowa Administrative Procedure Act. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001). When we review a district court decision reviewing agency action, our task is to determine if we would reach the same result as the district court in our application of the Act. *City of Des Moines v. Employment Appeal Bd.*, 722 N.W.2d 183, 189-90 (Iowa 2006).

The district court may reverse or modify an agency's decision if the agency's decision is erroneous under a ground specified in the Act and a party's substantial rights have been prejudiced. Iowa Code § 17A.19(10). The district court or an appellate court can only grant Harris relief from the commissioner's decision if a determination of fact by the commissioner "is not supported by substantial evidence in the record before the court when that record is viewed as a whole." *Id.* § 17A.19(10)(f). Just because the interpretation of the evidence is open to a fair difference of opinion does not mean the commissioner's decision is not supported by substantial evidence. *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 603 (Iowa 2004). An appellate court should not consider evidence insubstantial merely because the court may draw different conclusions from the record. *Fischer v. City of Sioux City*, 695 N.W.2d 31, 33-34 (Iowa 2005).

Permanent and Total Disability.

We first address Jacobson's claim that the finding of permanent and total disability is not supported by substantial evidence. It argues, among other things, that Harris's functional impairment ratings are too low to warrant a total disability finding; his pre-existing condition was not accounted for; some of Harris's complaints are not related to his work injury; he has very little decreased earning capacity; and he is still qualified and able to work in other jobs.

Industrial disability measures an injured worker's lost earning capacity. *Second Injury Fund v. Shank*, 516 N.W.2d 808, 813 (Iowa 1994). Industrial disability occurs when the 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. *Diederich v. Tri-City Ry.*, 219 Iowa 587, 593-94, 258 N.W. 899, 902 (1935). Factors that should be considered include the employee's functional impairment, age, intelligence, education, qualifications, experience, and the ability of the employee to engage in employment for which he is suited. *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. *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 104 (Iowa 1985).

As noted above, Dr. Friedman found an impairment rating of ten percent related to the wok injury. Jacobson now contends that "[s]omeone who is 90% functionally intact would not seem to be 100% disabled." However, Iowa case law is clear that functional impairment is not synonymous with industrial disability. As the supreme court stated in *Guyton*,

> [b]odily impairment is merely one factor in gauging industrial disability. Other factors include the worker's age, intelligence, education, qualifications, experience, and the effect of the injury on the worker's ability to obtain suitable work. When the combination of factors precludes the worker from obtaining regular employment to earn a living, the worker with only a partial functional disability has a total industrial disability.

373 N.W.2d at 103 (citations omitted). Moreover, other findings of total disability have been affirmed where the functional impairment was found to be quite low. *See Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 496 (Iowa 2003) (twelve percent functional impairment); *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 625 (Iowa 2000) (four to six percent functional impairment of right upper extremity).

Thus, Harris's functional impairment rating is but one of several considerations that factored into the finding of permanent total disability. According to the agency, those other factors include the following:

> Russell Harris is a truck driver who can no longer drive any significant distance because he cannot sit for extended periods. No physician on record indicated that he can return to driving and the primary treating physician, Dr. Friedman, specifically recommends that he not attempt to do so. As a valid FCE demonstrates, Harris is limited to light exertional level employment, whereas his work history is in truck driving, heavy railroad construction and factory production work. One who cannot sit or stand for extended periods is obviously at a severe disadvantage in the competitive labor market for production workers. Although Harris is a high school graduate and probably of at least average intelligence, defendants have not seen fit to offer vocational rehabilitation or training.

Also, Harris was fifty-four years old at the time of the hearing in November of 2005, a fact noted by the deputy. While a vocational expert hired by Jacobson was able to identify some transferrable skills and some jobs for which he might be qualified, those skills were very rudimentary and some of the jobs were not suitable based on Harris's work restrictions, qualifications, and education.

Accordingly, we conclude substantial evidence supports the determination that Harris is totally and permanently disabled. Harris is a truck driver who can no longer drive any significant distance or for any significant amount of time because he cannot sit for an extended period of time. The record before us contains substantial evidence to support the permanent and total disability finding. The fact that different inferences could be drawn from the same record does not diminish the soundness of the commissioner's findings and conclusions "[w]hen that record is viewed as a whole." *See* Iowa Code § 17A.19(10)(f)(3). As our supreme court has observed, "[t]otal disability does not mean a state of

absolute helplessness." *Al-Gharib*, 604 N.W.2d at 633. The question is whether Harris's work-related injury has "wholly disable[d] [him] from performing work that [his] experience, training, intelligence, and physical capacities would otherwise permit [him] to perform." *Id.* Credible evidence in the record made before the agency supports the deputy's conclusion that Harris is no longer able to engage in employment for which he is fitted. *See id.*

Weekly Compensation Rate.

Jacobson next maintains the determination of weekly compensation rate of $545.51 is in error and an abuse of discretion. Because Harris was not a salaried employee, but was rather paid on the basis of productivity, the hearing deputy calculated Harris's rate using Iowa Code section 85.36(6), which provides in pertinent part:

> In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury . . . . A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

In applying this section, the deputy averaged Harris's thirteen weeks of earnings prior to the injury. From that average of $827.52, he found Harris entitled to a compensation rate of $483.99. On appeal to the commissioner, Harris contended the deputy erred by including non-representative weeks in its calculation of the weekly average. The commissioner agreed, and revised the calculation to exclude three weeks in which his earnings were significantly lower

than the other ten weeks.[1] He found the weekly average to be $953.50 and awarded Harris benefits of $545.51 per week.

On appeal, Jacobson claims that because the commissioner did not indicate why the three discarded weeks were not representative or were uncustomary, his analysis constitutes an abuse of discretion. The commissioner merely stated "the weeks utilized by the presiding deputy were not weeks fairly representing claimant's customary earnings with the employer."

First, in analyzing Harris's weekly income figures, the commissioner observed that his "weekly earnings when he worked for [Jacobson] are within the general range of weekly earnings commonly seen in claims which come before this agency involving truck drivers." This appears to have been nothing more than a personal observation injected by the commissioner without any basis in the record. As such, we will not consider this on our review.

We next find it significant that even Harris admits, and the agency found, that Harris did not have fixed hours of work each week and the amount of work available to him on a weekly basis was not uniform. He testified that "[t]here was no certain set expectation of a certain amount every week. It was whatever the factors turned out to be." Paid based on mileage, his earnings varied due to a variety of factors common in the trucking industry, and he testified that his mileage might depend on what state he was traveling through and the corresponding speed limit, any construction that he may be forced to drive through, weather, and downtime while awaiting a new load. He further admitted to having no set expectation of a certain amount of miles on any given week.

[1] Harris's earnings on those weeks were $453.92, $227.52, and $247.36.

There does not appear to be any specific evidence in the record as to why the three weeks struck by the commissioner were lower than any other week. Harris merely testified that he had no idea why his earnings some weeks were particularly low, other than "I took off maybe three or four days home time." Without any substantial evidence as to why those three weeks were lower than the included week, other than normal fluctuations in productivity, we conclude it was an abuse of discretion and wholly irrational to have concluded they did not fairly reflect Harris's customary earnings. The only evidence in the record concerning his earnings is that they fluctuated widely based on a variety of factors, some not necessarily under the control of the truck driver. Harris's own testimony indicates that on any given week, a truck driver's earnings could be substantially lower than average. By discarding those three lower weeks from the average earnings calculation, the agency failed to consider normal, indeed expected, fluctuation in earnings. Accordingly, we reverse the commissioner's rate-finding of $545.51 and reinstate the deputy's award of $483.99. Costs of this appeal are assessed equally.

AFFIRMED IN PART, REVERSED IN PART.