

**IN THE COURT OF APPEALS OF IOWA**

No. 8-533 / 07-2017  
Filed September 17, 2008

**MIDWEST DRYWALL CO.,**  
Employer-Appellant,

**ST. PAUL FIRE AND MARINE  
INSURANCE COMPANY,**  
Insurance Carrier/Petitioner-Appellant,

**vs.**

**TERRENCE DEFFEBAUGH,**  
Claimant/Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,  
Judge.

Employer and insurance carrier appeal the district court's ruling on petition  
for judicial review affirming the workers' compensation commissioner's award of  
workers' compensation benefits. **AFFIRMED.**

Patrick V. Waldron and Jason W. Miller of Patterson Law Firm, L.L.P., Des  
Moines, for appellants.

David D. Drake of Lawyer, Lawyer, Dutton & Drake, L.L.P., West Des  
Moines, for appellee.

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

**MAHAN, J.**

Midwest Drywall Company and its insurer, St. Paul Fire and Marine Insurance Company, appeal the district court's ruling on petition for judicial review affirming the interim workers' compensation commissioner's award of worker's compensation benefits to Terrance Deffebaugh. We affirm.

**I. Background Facts and Proceedings**

Terrance Deffebaugh was raised and educated in Oklahoma. He did not graduate from high school, being three credits short of requirements. Deffebaugh later attended Job Corps taking trade and business/clerical classes. He graduated from Job Corps in 1984 and earned his general equivalency diploma (GED).

Most of Deffebaugh's work history has involved drywall installation, drywall finishing, and metal stud construction. He began this work life in high school when he helped with his brother's drywall construction business. Throughout the years, Deffebaugh has done residential and commercial drywall installation, finishing, and metal stud construction for various drywall contractors and for his own drywall business.

Drywall construction is physically demanding. A single drywall sheet weighs from 90 to 130 pounds, depending on its size. Drywall installers are expected to carry, position, and attach sheets of drywall to either wood or metal framing. The work can involve setting up and working on scaffolding, hammering or using a screw gun, lifting, standing, and bending. Much of a drywall installer's work requires that their arms be extended out or above their head for lengthy amounts of time throughout the day. Drywall finishers carry fifty-pound buckets

of “mud,” which is spread onto the drywall seams by applying pressure to the walls and above the head, bending, standing, and pushing.

In October 1989 Deffebaugh sustained an injury to his left shoulder while working for James Davis Drywall Company in Oregon. He was unable to work for a year, underwent treatment, and received social security disability while off work. In March 1991 Deffebaugh’s doctor declared his condition “medically stationary,” and claimed “any impairment would be based on subjective symptoms which would be related to chronic repetitive use as outlined in chapter 436 of up to 5 percent impairment only.”

Since 1991 Deffebaugh has performed drywall work for others and for his own business, Deffebaugh Construction.

In October 2003 Deffebaugh began working for Midwest Drywall at the Jordan Creek Mall project. On December 17, 2003, Deffebaugh was applying drywall to the outside of the Jordan Creek Town Center. He was in a self-leveling lift basket when the basket shifted and a stack of seven drywall sheets, each weighing about 130 pounds, fell on him, pinning him to the wall. The drywall struck him in the midsection of his lower back and upper buttocks area. Deffebaugh felt a burning sensation in the right side of his upper buttock and down his right leg. He promptly reported the accident to his supervisor.

On December 18, 2003, Deffebaugh saw a doctor at Concentra Medical Centers for lower back pain and pain in his right leg and buttocks area. He was prescribed pain medications and sent home. At a follow-up appointment Deffebaugh was put on physical therapy and on modified activity: no repetitive lifting over ten pounds, no pushing and/or pulling over twenty pounds of force.

On January 5, 2004, Deffebaugh was discharged from physical therapy and from the doctors at Concentra Medical Centers.

Deffebaugh attempted to return to work but was turned away due to a post-injury urine sample taken on December 18, which indicated the presence of marijuana. When Deffebaugh protested the results, he was told it did not matter because the Jordan Creek job was wrapping up and there was no modified work for him to do there. Deffebaugh later submitted a clean urine analysis but was given no further work for Midwest Drywall.

Deffebaugh began taking classes at William Penn University on January 6, 2004, toward a two-year degree in leadership studies. He hoped the degree would enable him to work on the administrative side of the construction business.

Deffebaugh worked for Allied Construction in February 2004 on a project that included drywall installation. Deffebaugh reported he experienced a flare-up of his symptoms in his low back and he was unable to continue working. He returned to Concentra Medical Center, where he was prescribed modified activity and continued physical therapy.

Throughout the following two years, Deffebaugh continued to engage in physical therapy exercises and consult various physicians regarding pain to his lower back and buttocks area on his right side.

On October 19, 2005, Andrew Bartek of Johnston Physical Therapy and Sports Medicine performed a functional capacity evaluation (FCE) on Deffebaugh “to determine safe work capacities following a reported work injury occurring 12/17/03 when a piece of drywall struck him in the low back.” The results of the

FCE placed Deffebaugh at the medium physical demand level and restricted Deffebaugh to lifting fifty-five pounds on an occasional basis and up to thirty pounds on a more frequent basis. The FCE was accompanied by a letter written by Bartek in which he noted a permanent lifting restriction from a previous shoulder injury.

On October 28, 2005, Dr. Jacqueline Stoken conducted an independent medical examination and review of Deffebaugh's injury. She listed and summarized every doctor visit Deffebaugh made after the December 17, 2003 injury. She conducted diagnostic testing, an extensive physical examination, and an occupational history. She diagnosed Deffebaugh with "acute low back strain, right SI joint dysfunction and right piriformis syndrome" and "chronic right low back pain." She placed him in the medium work classification and concluded that his workplace injury resulted in an eight percent impairment to the body as a whole and restrictions of no repetitive bending, lifting, and twisting and no lifting more than fifty pounds on a continuous basis.

On November 16, 2005, Deffebaugh underwent an assessment by Dr. Kurt Smith, a physiatrist at Iowa Orthopaedic Center. Smith wrote, "In regard to permanent impairment . . . he falls in a DRE lumbar category 2 with outgoing muscular spasms at the time of the examination and asymmetrical loss of motion with a 5% whole body impairment." Smith recommended "[m]odified work with a 50-pound lifting restriction. Medium category work. Avoid prolong sitting and standing activity. Permanent."

Deffebaugh's petition for benefits went before a deputy workers' compensation commissioner on January 26, 2006. The deputy denied healing period and industrial disability benefits, concluding:

The claimant has new restrictions on his low back but remains in the medium work category even with these restrictions. Furthermore, the notes from the functional capacity evaluation suggest that the claimant received those restrictions not because of his low back but due to his previous shoulder injury. There is no loss on account of the low back. The claimant had already chosen to pursue less physically demanding work before this work injury. Claimant retains the ability to work in self-employment to the same degree he did before his injury.

On inter-agency appeal, the interim workers' compensation commissioner modified the ruling in part and ordered Midwest Drywall and St. Paul Fire and Marine to pay permanent partial disability benefits. Relying upon the medical opinions of Drs. Stoken and Smith, the commissioner concluded that as a result of the Deffebaugh's work injury of December 18, 2003, he sustained a five percent whole body impairment along with the need for restrictions of no lifting greater than fifty pounds on a continual basis, no repetitive bending, lifting, or twisting, and no work greater than eight hours a day. The commissioner rejected the employer's claim that the restrictions placed on Deffebaugh were a result of his earlier shoulder injury.

Furthermore, the commissioner rejected the deputy's conclusion that Deffebaugh had suffered no industrial loss because he "had already chosen to seek lighter work." The commissioner discussed Deffebaugh's permanent functional impairment and work restrictions, Deffebaugh's age, his efforts to pursue additional education tempered by the fact that his training was not yet complete, and that there was nothing to establish that there would be available

positions for him. The commissioner noted that Deffebaugh continued to perform heavy work lifting and installing drywall at or above his chest level on the date of his injury and that he was now precluded from a return to work in his primary vocation of drywalling and framing. The commissioner thus concluded that Deffebaugh sustained a twenty percent industrial loss.

On petition for judicial review, the district court carefully explored the objections to the commissioner's ruling and affirmed.

On appeal, the employer and insurer claim the commissioner failed to give appropriate deference to the credibility findings of the presiding deputy and that the commissioner's decision is unsupported by substantial evidence. We affirm the rulings of the district court and the workers' compensation commissioner.

## **II. Standard of Review**

Iowa Code chapter 17A (2007) governs our review of decisions of the workers' compensation commissioner. Iowa Code § 86.26. The factual findings of the commissioner are reversed only if they are not supported by substantial evidence. Iowa Code § 17A.19(10)(f), *Midwest Ambulance Serv. v. Ruud*, \_\_\_ N.W.2d \_\_\_, \_\_\_, (Iowa 2008). Evidence is substantial if a reasonable person would find it adequate to reach the conclusions reached by the agency. *Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 356 (Iowa 1999). Evidence is substantial even though it would have supported contrary inferences. *Id.* We may reverse the commissioner's application of law to the facts only if it is "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(m); *Midwest Ambulance Serv.*, \_\_\_ N.W.2d at \_\_\_. We review the district court's decision by applying the standards of chapter 17A 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. Discussion**

**A. Permanent Partial Disability Finding.** The commissioner reviewed the record in this case and found that Deffebaugh is physically precluded from a return to work in his primary vocation of drywalling and framing. Midwest Drywall and its insurer argue that the commissioner failed to give adequate deference to the deputy commissioner's implied credibility finding in the deputy's conclusion that Deffebaugh had "already chosen to pursue less physically demanding work before the injury" and thus suffered no disability.

We first note that deputy's proposed findings are not a consideration on our review because the deputy's decision is not final agency action subject to judicial review. *Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 358 (Iowa 1999) (noting that deputy industrial commissioner's proposed findings are not a consideration on judicial review); see also *Midwest Ambulance Serv.*, \_\_\_ N.W.2d at \_\_\_ (noting that deputy commissioner made contrary finding than that of commissioner, but it is commissioner's findings that are binding).

The commissioner found Deffebaugh's primary vocation was drywalling and framing. The record indicates that for more than fifteen years Deffebaugh chiefly worked in drywall and framing. He was injured while installing drywall and he attempted to return to drywall installation after the injury. The commissioner noted Deffebaugh had "not yet obtained a degree nor has it been established that there will be available positions in a career such as drafting." The



commissioner concluded Deffebaugh's attendance at William Penn did not preclude a claim for permanent partial disability.

The employer argues there is evidence Deffebaugh had decided to pursue less physically demanding work. "Mere recognition that there is substantial contrary evidence in the record does not mean that the commissioner's determination may be successfully attacked on appeal." *Midwest Ambulance Serv.*, \_\_\_ N.W. 2d at \_\_\_\_. The burden here is on the employer to show that the commissioner's determination is lacking in substantial evidence. *Id.* *Midwest Drywall* has failed to sustain its burden.

There is substantial evidence in the record to support the commissioner's conclusion that Deffebaugh suffered a permanent partial disability in that he was not capable of "returning to employment substantially similar to the employment in which [he] was engaged at the time of injury." Iowa Code § 85.33(2). The commissioner's conclusions are not "irrational, illogical and wholly unjustifiable." Iowa Code § 17A.19(10)(m).

**B. Industrial Disability.** Industrial disability measures an injured worker's lost earning capacity. *Myers*, 592 N.W.2d at 356. Factors to be considered include the employee's functional impairment, the injured employee's age, education, qualifications, and the ability of the employee to engage in similar employment. *Id.* "The commissioner is not required to fix disability with precise accuracy." *Id.* at 357.

As noted above, the commissioner reviewed the record and discussed Deffebaugh's permanent functional impairment and work restrictions, Deffebaugh's age, his efforts to pursue additional education tempered by the fact

that his training was not yet complete, and there was nothing to establish that there would be available positions for him. The commissioner noted that Deffebaugh continued to perform heavy work lifting and installing drywall at or above his chest level on the date of his injury and that he was now precluded from a return to work in his primary vocation of drywalling and framing. The commissioner concluded Deffebaugh sustained a twenty percent industrial loss.

Midwest Drywall and its insurer insist the commissioner's finding of industrial disability is not supported by substantial evidence. They argue that the commissioner incorrectly relied upon the records of Drs. Stoken and Smith. They claim Deffebaugh was not honest and forthright with Dr. Stoken.

In reviewing the record, the commissioner determined the medical assessments of Drs. Stoken and Smith were credible and accurate, and he makes no mention of credibility issues related to subjective versus objective medical proof of injury. The commissioner stated:

Relying upon these medical opinions, it is concluded that as a result of claimant's work injury on December 17, 2003 claim sustained a five percent whole body impairment along with the need for restrictions of no lifting greater than 50 pounds on a continual basis, no repetitive bending, lifting, or twisting, and no work greater than eight hours per day.

A reasonable person would find the evidence noted by the commissioner adequate to reach its conclusions.

Midwest Drywall and its insurer also argue that the record evidence shows that Deffebaugh suffered no loss of earning capacity because he was never gainfully employed in the competitive labor market. They note that his employment was not steady or lucrative. They argue that because Deffebaugh is

enrolled at William Penn, his access to the competitive job market and his ability to be gainfully employed are now greater than before he was injured.

As noted, industrial disability requires consideration of many factors. *Myers*, 592 N.W.2d at 356. It is for the commissioner to determine the weight to be given a factor. *See IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 635 (Iowa 2000) (noting it is commissioner's function as fact finder to determine weight of evidence).

The commissioner here discusses the various factors of Deffebaugh's permanent functional impairment and work restrictions, his age, his past history of heavy work, even following left shoulder injury. The commissioner noted the uncertainty that Deffebaugh would find a position in a different field. The commissioner determined Deffebaugh sustained a twenty percent industrial loss.

We conclude the commissioner's findings are supported by substantial evidence in the record. We therefore affirm the district court's ruling on judicial review affirming the commissioner's decision.

**AFFIRMED.**