

IN THE COURT OF APPEALS OF IOWA

No. 0-349 / 89-1817

FILED

OCT 23 1990

CLERK SUPREME COURT

GEORGE ARMSTRONG,

Appellee,

vs.

IOWA DEPARTMENT OF BUILDINGS & GROUNDS and STATE OF IOWA,

Appellants.

Appeal from the Iowa District Court for Polk County,
Rodney J. Ryan, Judge.

Defendant appeals a ruling by the district court
awarding the claimant permanent disability benefits under
the odd-lot doctrine. **AFFIRMED IN PART, REVERSED IN PART
AND REMANDED**

Thomas J. Miller, Attorney General, and Joanne Moeller,
Assistant Attorney General, for appellants.

Dennis L. Hanssen of Hopkins & Huebner, Des Moines, for
appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Petitioner George Armstrong was injured on July 28, 1978, while working as a custodian for the Iowa House of Representatives. As a result of this injury Armstrong had double hernia surgery. The Industrial Commissioner determined that he had a 10% permanent partial disability, and the supreme court agreed. See Armstrong v. State of Iowa Buildings & Grounds, 382 N.W.2d 161, 167 (Iowa 1986). The court noted that Armstrong had other problems which were caused by anxiety and alcoholism, not work injury. Id. at 166.

Armstrong filed a petition for review-reopening on December 8, 1981, while his previous case was pending, in which he claimed that his condition had deteriorated since his original petition and that he should be considered an odd-lot employee. He did not act on this petition until after the supreme court decision in his earlier case. Armstrong had recurrent hernia repair surgery in March 1986.

The Industrial Commissioner found that any change in Armstrong's earning capacity was not proximately caused by the 1978 injury. The Commissioner awarded him temporary total disability benefits, but no additional permanent disability benefits.

Armstrong filed a petition for judicial review. The district court found there was not substantial evidence to support the Commissioner's finding that the changes in

Armstrong's condition were not caused by the 1978 injury. The court held that Armstrong should be awarded permanent disability benefits under the odd-lot doctrine.

There are two issues on appeal. The first is whether there is substantial evidence to support the Commissioner's decision. The State believes that if Armstrong's physical condition had deteriorated, it was caused by other factors, not the work injury. The State also asserts there was no change in Armstrong's earning capacity.

The second issue involves whether Armstrong met the requirements of the odd-lot doctrine. The State argues that Armstrong did not present a prima facie case because he failed to demonstrate that he made a reasonable effort to obtain employment.

We affirm the district court's decision awarding permanent disability to the claimant, but reverse with regard to the decision that the claimant made a prima facie case for the odd-lot doctrine.

Our scope of review was set out in Henry v. Iowa Dep't of Transp., M.V.D., 426 N.W.2d 383, 385 (Iowa 1988):

reviewing a district court decision on the validity of an agency action, we decide only whether the district court has correctly applied the law. The district court itself acts in an appellate capacity to correct errors of law on the part of the agency. When we review such action by the district court, we merely apply the standards of section 17A.19(8) to determine whether our conclusions are the same as those of the district court. If the conclusions are the same, we affirm; otherwise we reverse. (Citations omitted.)

The law is well settled that in a review-reopening proceeding where the employer's liability has previously been established, a claimant may obtain increased compensation by proving an increased disability which was proximately caused by the injury. DeShaw v. Energy Mfg. Co., 192 N.W.2d 777,780 (Iowa 1971). This is all the claimant must prove. Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667, 670 (Iowa 1971).

The Industrial Commissioner correctly found that the surgery repair performed on March 28, 1986 was causally connected to the injury on July 26, 1978. However, the Industrial Commissioner ignored the undisputed opinions expressed by Dr. From concerning the physical limitations and impairment of claimant.

Claimant's case must stand or fall on the testimony of his expert witnesses, Dr. From and Roger Marquardt, the vocational expert. The Industrial Commissioner chose to reject their testimony and as the fact finder the Commissioner may do this if it is determined that such testimony is without credibility. Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667, 668 (Iowa 1971). However, the Commissioner may not arbitrarily or totally reject the offered testimony. Id. Further, when evidence is undisputed and not subject to different inferences, an issue is to be decided as one of law. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). If there were different inferences to be drawn from

the testimony of claimant's experts, the Industrial Commissioner failed to discuss these inferences in his opinion.

The claimant established, by way of expert testimony that his disability had increased since his initial compensable injury. Dr. From testified that after claimant's second surgery there was a permanent physical impairment and limitations due to the hernia repair. He further testified that the claimant had a five percent permanent body as a whole impairment. These permanent and physical impairments and limitations are a change of condition from the initial hearing and original award and form the basis for an increased disability of claimant.

Defendant argues the claimant is disabled due to his other physical ailments. However, to prove proximate cause for disability, claimant only needs to prove that the disability from the injury is a substantial factor. He does not need to prove that it is the only cause. Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d at 670.

The expert testimony of Dr. From established that the disability from the hernia was a substantial factor in the disability of the claimant. In reviewing the record, it is evident Dr. From carefully excluded the claimants other physical ailments when expressing his opinion regarding the claimants disability.

We find the existence of substantial evidence demonstrating that claimant has experienced a permanent

change in condition since his 1978 hernia operation and affirm the district court with regard to this issue.

The second issue raised by the defendant involves the contention that the claimant did not present evidence sufficient to support a claim under the odd-lot doctrine. Under this 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. An odd-lot worker is thus 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" Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985) (quoting with approval, Lee v. Minneapolis Street Railway Co., 230 Minn. 315, 320, 41 N.W.2d 433, 436 (1950)).

The supreme court noted in Guyton that, "The odd-lot doctrine involves an allocation of the burden of production of evidence." Id. The supreme court reaffirmed the proposition of law that the burden of persuasion on the issue of industrial disability always remains with the worker. "The cases, however have distinguished between burden of persuasion and burden of production in other worker's compensation situations." Id.

As it relates to the allocation of the burden of production of evidence, the supreme court in Guyton adopted the following from 2A Larsen, The Law of [Worker's] Compensation, section 57.51 at 10-164.95 to 10-164.113:

A suggested general purpose principle on burden of proof in this class of cases would run as follows: If the evidence of 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 should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant.

However, the supreme court, in adopting Professor Larsen's statement in Guyton case, emphasized that the rule just announced merely allocates the burden of production of evidence. The supreme court further stated: "It is triggered only when the worker makes a prima facie case for inclusion in the odd-lot category:

It is normally incumbent upon an injured [worker], at a hearing to determine loss of earning capacity and to demonstrate a reasonable effort to secure employment in the area of . . . residence. Where testimony discloses that a reasonable effort was made, the burden of going forward with evidence to show the availability of suitable employment is on the employer and carrier.

Id. Therefore, as the court held in Guyton, "when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market," the burden to produce evidence of suitable employment shifts to the employer.

Here, Mr. Armstrong failed to present evidence to show that he made even a reasonable effort to look for employment. Additionally, there is no evidence that he looked for any type of employment in the nine years since his injury. Because he has failed to provide evidence with regard to other employment, he does not have a prima facie case under the odd-lot doctrine.

We find there is sufficient evidence to support a claim that the claimants condition has worsened since the surgery in 1978. However, the claimant failed to prove even a prima facie case under the odd-lot doctrine.

We affirm the trial court and remand to the Industrial Commissioner for a determination of the claimant's disability under the record made in the review-reopening hearing.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Hayden, P.J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I agree with the State there is substantial evidence to support the commissioner's decision. I would reverse the trial court and affirm the commissioner.