IN THE COURT OF APPEALS OF IOWA

No. 3-554 / 93-314

IOWA PORK INDUSTRIES n/k/a DAKOTA PORK INDUSTRIES and CNA INSURANCE COMPANY,

Appellants,

vs.

MARY GOTHIER,

Appellee.

FILED
OCT 25 1994
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

The petitioner challenges the district court's ruling upholding the industrial commissioner's decision awarding the respondent a fifty percent industrial disability. **AFFIRMED.**

Michael P. Jacobs of Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser, Sioux City, for appellants.

Gary L. Johansen of Johansen & Johansen, Sioux City, for appellee.

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

CADY, J.

This appeal requires us to determine if substantial evidence supports an award of a fifty percent industrial disability in a workers compensation case. We find it does, and affirm.

Mary Gothier is a former employee of Iowa Pork Industries and its successor corporation, Dakota Pork Industries (collectively referred to as Dakota Pork). She was injured in the course of her employment on March 4, 1988. The injury consisted of a neuromuscular sprain to her right shoulder. An orthopaedic surgeon diagnosed the impairment to be nine percent of the whole person. Mary missed work for over one year. Dakota Pork paid her 88 5/7 weeks of compensation benefits which included all of her healing period plus 45 weeks (nine percent) of permanent partial disability.

Mary returned to Dakota Pork in March 1989. She was given a job which paid the same salary she earned on the date of her injury. Mary was restricted from doing moderate to heavy lifting. Dakota Pork designed a job to accommodate her limitations. In August 1989, she notified Dakota Pork she was quitting her job so that she could attend school to pursue a career in nursing. Mary was accepted at St. Luke's School of Nursing in Sioux City.

Mary subsequently filed a notice and petition for arbitration before the industrial commissioner seeking industrial disability benefits. A deputy determined Mary

suffered a fifty percent loss of earning capacity and awarded her fifty percent of permanent partial disability benefits.

Mary was thirty-eight years old at the time of the hearing. She graduated from high school in 1970 and had worked as a general production laborer in the meat packing industry since 1973. Mary is divorced and the custodial parent of two children who were twelve and ten years of age.

At the time of the hearing in November 1990, Mary had completed her first year of a two-year nursing program. She received above average grades in classroom courses during the first year and completed all clinical work. The clinical portion of the program included performing nursing duties at a hospital. Students were evaluated on a satisfactory or unsatisfactory scale. Mary satisfactorily performed all clinical duties, including lifting patients and other physically demanding tasks. She would, however, occasionally experience some pain and spasms in her shoulder which she treated with aspirin or Tylenol. Mary testified her shoulder injury was not a significant limitation in her nurse's training. Her tuition was paid by grants and other aid.

Mary withdrew from the second year of the nursing program a few weeks prior to the hearing, but intended to re-enroll in January 1991. She withdrew because she missed a considerable amount of clinical training sessions to be

with her daughter who suffers from asthma. She was committed to completing nurse's training at another school which offered a different schedule.

Mary earned $6.80 an hour at the time she left her employment at Dakota Pork. Licensed practical nurses in the Sioux City area earn between $7.00 and $9.00 an hour. Registered nurses earn between $9.00 and $13.00. Mary worked as a convenience store clerk during the summer prior to beginning her second year of nurse's training and earned $3.89 an hour.

In determining the percentage of industrial disability, the deputy industrial commissioner found it was "highly uncertain and speculative" that Mary would complete the nursing program and become employed as a nurse. The agency acknowledged its decision could be reviewed in the future if the retraining was ultimately successful.

The industrial commissioner upheld the decision of the deputy commissioner. The district court affirmed the decision of the industrial commissioner.

Dakota Pork appeals. It claims the award of a fifty percent industrial disability is unsupported by substantial evidence and is unreasonable, arbitrary, and capricious.

Our appellate review of decisions by the district court involving their review of decisions from the industrial commissioner is at law. Bearce v. FMC Corp., 465 N.W.2d 531, 534 (Iowa 1991). Like the district court, we apply the substantial evidence rule of section 17A.19(8)(f)

and review the record to determine if it supports the agency decision. Id. This standard binds us to the findings made by the agency if supported by substantial evidence. Id. Evidence is substantial when a reasonable mind could accept it as enough to reach the same finding. Id. It is not unsubstantial merely because it supports contrary inferences. Id. We are able to determine the facts as a matter of law only when the relevant evidence is uncontroverted and reasonable minds could not draw different inferences from the evidence. Id.

In our consideration of the case, we are mindful of the legal criteria used to determine an industrial disability. Industrial disability means loss of earning capacity. It is found by pin-pointing the loss to the employee's earning capacity of the body and is expressed as a percentage. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 14 (Iowa 1993). The factors to consider in making this determination include the employee's actual impairment of the body function, age, education, qualifications, experience, and inability to engage in suitable employment because of the injury. Id. at 14-15.

The record established that the injury to Mary impaired her earning capacity. She was thirty-eight years old and no longer employable as an active laborer in the industry she had engaged in for fifteen years. She has a high school education and is a single parent. She suffered a nine percent functional disability and is excluded from performing demanding physical tasks.

The real point of contention, however, is the impact of Mary's retraining as a nurse in determining the amount of the industrial disability. The agency found it was too speculative to conclude Mary would complete the necessary training to become a nurse. The agency also found that her injury would hinder any future employability as a nurse due to the physical demands of nursing work. The agency then concluded:

> This agency is decided that an assessment of future success of retraining is improper in an industrial disability case. It is only claimant's present, not future, earning capacity which is to be measured in awarding permanent disability benefits. . . . Therefore, claimant's present industrial disability will be fully compensated. Certainly, if claimant's educational pursuits are eventually successful, this agency is available upon proper petition by defendant to review this award at a later date.

Our courts recognize that the benefits derived from retraining or additional education pursued by an injured worker are speculative until the retraining or additional education is completed and new employment secured. Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 831 (Iowa 1992). Contrary to the conclusions of the agency, however, the pursuit of special training or additional education is an appropriate factor to consider in determining the degree of industrial disability. Id. The agency's statements to the contrary are erroneous.

Notwithstanding, our review is confined to the issues raised on appeal. See Atwood v. City of Des Moines, 485 N.W.2d 657, 659 (Iowa 1992). No specific claim is made

that the agency applied an incorrect rule of law. Moreover, the agency did not completely disregard evidence of vocational retraining as a matter of law, but made findings that the evidence was too speculative to impact the industrial disability determination. We review those findings, together with all the other evidence, to determine whether the agency's decision was supported by substantial evidence as a whole.

We find the resolution of this question to be very close. The evidence in the case projected that Mary was committed to completing the nursing program. Her reasons for withdrawing from the program were unrelated to her ability or motivation, and the problem responsible for her withdrawal was capable of resolution. There was no hint of evidence in the record to conclude Mary was financially unable to complete the training program. Moreover, Mary's performance during the first year of training revealed she was capable of meeting the demands of nursing.

On the other hand, there was evidence that Mary had limitations in performing some physical work and would experience pain from doing some of physical labor involved in nursing. The record also revealed nursing requires physical stamina. More importantly, Mary was not enrolled in the training program at the time of the hearing. She has much ahead of her before realizing her aspiration of becoming a nurse. In the meantime, her employment opportunities are limited. Her future is speculative.

While we might arrive at a different decision based on our view of the evidence, we are bound by our legal standards in the resolution of this case. Our role is strictly circumscribed. Morrison v. Century Engineering, 434 N.W.2d 874, 876 (Iowa 1989). We must focus on the evidence favorable to the agency's findings even though it was contradicted. Second Injury Fund v. Hodgins, 461 N.W.2d 454, 456 (Iowa 1990). Our focus is not whether the evidence supports a different finding, but whether it supports the finding made. Ward v. Iowa Dep't of Transp., 304 N.W.2d 236, 237-38 (Iowa 1981).

We conclude the agency decision to award Mary industrial disability of fifty percent was supported by substantial evidence. There was evidence in the record, as a whole, which reasonable minds could find adequate to reach the decision made by the agency.

Similarily, we reject the claim by Dakota Pork that the industrial disability award was unreasonable, arbitrary, capricious and an abuse of discretion. An abuse of discretion occurs when the agency decision is based on clearly untenable grounds. Equal Access Corp. v. Utilities Bd., 510 N.W.2d 147, 151 (Iowa 1993). The unreasonable, capricious and arbitrary standard of review incorporates the abuse of discretion standard. McClure v. Iowa Real Estate Comm'n, 356 N.W.2d 594, 597 (Iowa App. 1984). Arbitrary and capricious, as applied to agency action, essentially means the action is without regard to the law

or the facts of the case. Norland v. Iowa Dep't. of Job Serv., 412 N.W.2d 904, 912 (Iowa 1987). Although the agency drew conclusions we might not have made from our review of the record as a whole, the decision made clearly was not unreasonable, arbitrary, capricious, or an abuse of discretion.

In conclusion, we affirm the decision of the industrial commissioner. In doing so, we recognize, as the agency did, that review-reopening proceedings are available to adjust an original industrial disability award to reflect subsequent changes in an employee's earning capacity. See Blacksmith v. All-American, Inc., 290 N.W.2d 348, 350 (Iowa 1980).

AFFIRMED.