IN THE COURT OF APPEALS OF IOWA

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No. 6-783 / 96-184

JOSE MURILLO,
Appellee,

vs.

BLACKHAWK FOUNDRY and **SEDGWICK JAMES,**
Appellants.

FILED
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Appeal from the Iowa District Court for Scott County, John Nahra, Judge.

The respondents appeal the district court's ruling on judicial review reversing the Industrial Commissioner's decision on the petitioner's workers' compensation claim determining that he suffered a twenty-five percent industrial disability due to a work-related injury. **AFFIRMED IN PART AND REVERSED IN PART.**

Jean Dickson Feeney and Mark A. Woollums of Betty, Neuman & McMahon, L.L.P., Davenport, for appellants.

Daniel Bernstein and William J. Briebriesco of William J. Briebriesco & Associates, Bettendorf, for appellee.

Heard by Sackett, P.J., and Cady and Vogel, JJ.

CADY, J.

Blackhawk Foundry and Sedgwick James appeal a ruling by the district court reversing the Industrial Commissioner's decision to award a claimant a twenty-five percent disability due to a work-related injury. Blackhawk and James claim: (1) the district court erred in determining the Commissioner improperly considered the employer's accommodation of Murillo's condition in ascertaining his industrial disability, and (2) the district court erred in determining the Commissioner's reduction of penalty benefits was arbitrary and capricious.

I. Scope of Review

In reviewing a district court decision on the validity of an agency decision, we decide only whether the district court has correctly applied the law. *Henry v. Iowa Dep't of Transp.*, M.V.D., 426 N.W.2d 383, 385 (Iowa 1988). The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Id.*

III. Reduction of Industrial Disability

Jose Murillo, was injured on June 10, 1991, while working as a welder for Blackhawk. Blackhawk's workers' compensation carrier was James. Murillo suffered a broken hip and a compression fracture in his lower back. He was subsequently released to return to work, with a fifty-pound lifting restriction.

On June 18, 1993, Murillo reinjured his back at work while lifting. After a brief time away from work, Murillo returned to light-duty work with Blackhawk on August 4, 1993. Because of his injuries, however, Murillo could no longer work as

a welder. Blackhawk accommodated his work restrictions by finding another suitable job as a core cleaner. Murillo worked for approximately the same hourly wage he received prior to his work-related injuries and even worked longer hours. In addition, Murillo performed freelance work as a photographer. A treating physician gave Murillo a twenty-four percent permanent functional impairment rating to the body as a whole due to his work-related injuries.

Murillo filed a claim for workers' compensation benefits. Blackhawk failed to pay permanent partial disability benefits to Murillo leading him to seek penalty benefits under Iowa Code section 86.13.

The Deputy Industrial Commissioner entered an arbitration decision finding Murillo suffered a work-related injury causing him a sixty-five percent industrial disability. The Deputy Commissioner ordered Blackhawk and its insurer to pay 325 weeks of permanent partial disability benefits. The deputy also assessed forty-four weeks of penalty benefits due to the unreasonable delay in paying disability benefits.

The Industrial Commissioner reversed the decision by the deputy on appeal. He found Murillo suffered a twenty-five percent permanent impairment. The Commissioner concluded:

> The severity of [Murillo's] industrial disability is mitigated by the fact that herein we have an employer that has fully accommodated any and all [Murillo's] work restrictions; . . . [and] compensates [Murillo] at the same hourly rate with increased weekly hours, this resulting in an increase in actual earnings.

Our initial task is to determine whether the Industrial Commissioner's consideration of the employer's accommodation as a factor in determining industrial disability was error.

Industrial disability measures an injured worker's lost earning capacity. *Second Injury Fund v. Shank*, 516 N.W.2d 808, 813 (Iowa 1994). Factors to consider 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).

In determining industrial disability, the Commissioner may disregard an accommodation made by the employer in considering the injured worker's ability to earn in the competitive job market. *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 617 (Iowa 1995). This is because the accommodations made by the employer may not transfer to the competitive job market. *Id.* A worker may not find another employer willing to provide the accommodations, and may consequently suffer an industrial disability in excess of the permanent impairment rating. *Id.*

On the other hand, we do not believe it is necessarily impermissible for the Commissioner to consider an accommodation by an employer following a work-related injury. The question is not whether an accommodation was made, but whether

it would transfer to the competitive labor market as a whole. *See Thilges*, 528 N.W.2d at 617.

In this case, Murillo was given a *different* job following the injury to his back which left him with lifting restrictions. There was no indication, however, the accommodation or new job involved special considerations not available in the competitive employment market. Thus, we cannot conclude the Commissioner erred as a matter of law in considering the new job Murillo was provided by his employer.

We find substantial evidence to support the finding of the Commissioner. The Commissioner found Murillo suffered an industrial disability, and awarded a permanent impairment rating in excess of the functional impairment. Although the amount of the industrial disability is debatable, we cannot conclude the finding made by the Commissioner was not supported by substantial evidence. Substantial evidence is not absent merely because it is possible to draw different conclusions from the same evidence. *Riley v. Oscar Mayer Foods Corp.*, 532 N.W.2d 489, 491 (Iowa App. 1995). Moreover, we may interfere with the findings of the Commissioner only if the evidence is uncontradicted and reasonable minds could not draw different inferences. *Id.*

III. Reduction of Penalty Benefits

Commissioner found Blackhawk's failure to pay permanent partial disability benefits was unreasonable, but concluded a twenty percent penalty was appropriate. This entitled Murillo to twenty-five weeks of penalty benefits. The district court

found the Commissioner's reduction was arbitrary and capricious because he did not explain the basis for the reduction. Our scope of review is for correction of errors at law. Iowa R. App. P. 4.

The Commissioner has a duty in a workers compensation case to explain the evidence he relied on and to detail his reasons for his conclusions. *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 274 (Iowa 1995). We believe this applies to conclusions relating to the imposition of penalty benefits. The Commissioner set the penalty benefits at twenty-five weeks with no explanation. *See Vosberg v. A.Y. McDonald Mfg. Co.*, 519 N.W.2d 405, 409 (Iowa App. 1994). Accordingly, we remand to the Commissioner for additional findings.

IV. Conclusion

We reverse the district court decision in part and affirm the decision of the Industrial Commissioner to award Murillo a twenty-five percent permanent impairment. We otherwise affirm the district court decision and remand the case for additional proceedings consistent with this opinion.

AFFIRMED IN PART AND REVERSED IN PART.

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

VOGEL, J. (dissenting)

I respectfully dissent.

The *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 617 (Iowa 1995), court provides guidance in determining the role of accommodation and earning capacity in reviewing the Commissioner's disability impairment rating. The *Thilges* court reiterated the arbitration decision of the deputy Commissioner:

> In the competitive employment market a person [with a disability and work restriction] . . . will find it difficult to find employment when these factors are considered in conjunction with claimant's education, past employments and lack of transferrable skills. *Employer's accommodation for claimant's permanent impairments and permanent restrictions and other bodily complaints will not necessarily transfer, however, to the competitive labor market as a whole* . . . . Claimant is not likely to find other employers in the competitive employment market as understanding, cooperative and helpful as this employer has been . . . . For these reasons claimant is entitled to an industrial disability allowance in excess of her permanent impairment rating.
>
> In considering petitioner's argument, we are satisfied that the commissioner was correct in viewing loss of earning capacity in terms of the injured worker's present ability to earn in the competitive job market *without regard to the accommodation* furnished by one's present employer.

Id. (Emphasis added.)

In *Arrow-Acme Corp. v. Bellamy*, 500 N.W.2d 92, 95 (Iowa App. 1993), the employer contended continuous employment operated to bar, as a matter of law, a determination of partial permanent industrial disability. This court found no support in the law for such proposition, noting the operative phrase is loss of earning capacity, not loss of actual earnings. Thus, it is conceivable that an employee may presently

earn a higher wage than his or her pre-injury earnings and still have a reduced earning capacity. *Id.* In the present case, while Murillo is working increased hours and thus earning higher wages as a core cleaner, this does not mitigate the fact Murillo has decreased earning capacity at his former trade as a trained welder.

Murillo's loss of earning capacity is significant in terms of his present ability to earn money in a competitive job market without regard to Blackhawk's accommodations.

The Iowa Supreme Court in *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 157-58 (Iowa 1996), noted from the Commissioner's ruling "if claimant were to be suddenly thrust into the job market, his ability to compete with other workers for positions would be limited in the most extreme sense. Clearly, without the accommodation, claimant's disability would be permanent and total." *Id.* at 158. Accordingly, while Blackhawk's efforts to accommodate Murillo's disability are noteworthy, such efforts are not determinative of Murillo's industrial disability rating. *See Thilges*, 528 N.W.2d at 617. Had Blackhawk failed to accommodate Murillo, his disability would severely diminish his ability to find suitable employment in the competitive job market.

I agree with the district court that the Commissioner improperly considered Blackhawk's accommodation of Murillo's work restrictions in determining Murillo's industrial disability. I would conclude the determination Murillo only sustained a twenty-five percent industrial disability and awarded 125 weeks of permanent partial

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disability benefits was based in part on an error of law. His injury prevents him from engaging in the type of employment for which he is trained. Accordingly, I would find the district court correctly applied the law and properly reversed and remanded the case to the Commissioner to determine Murillo's industrial disability rating without regard to Blackhawk's accommodation.