

IN THE COURT OF APPEALS OF IOWA

No. 1-195 / 90-1658

FILED

AUG 27 1991

CLERK SUPREME COURT

JOHN A. GALLARDO,

Appellant,

200

vs.

FIRESTONE TIRE & RUBBER COMPANY and
CIGNA INSURANCE COMPANIES,

Appellees.

Appeal from the Iowa District Court for Polk County,
Jack D. Levin, Judge.

Gallardo appeals the district court upholding the
agency's denial of additional benefits. **AFFIRMED.**

David D. Drake of Lawyer, Lawyer, Dutton & Drake,
Des Moines, for appellant.

Frank T. Harrison of Hopkins & Huebner, P.C.,
Des Moines, for appellees.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

HABEAS, J.

In 1980 Firestone employee John Gallardo suffered a work-related back injury and received workers' compensation benefits.

In 1984 Gallardo filed a review-reopening petition seeking additional workers' compensation benefits. Following a November 1985 hearing, a deputy industrial commissioner established Gallardo's industrial disability at fifty percent. Upon an administrative appeal, the agency reduced the industrial disability figure to forty percent and modified Gallardo's benefits accordingly.

Meanwhile, Gallardo filed a second review-reopening petition (the present proceeding), once again seeking additional benefits. This second petition came on for hearing in April 1988. A deputy industrial commissioner denied any additional benefits, concluding that Gallardo had shown no change of condition since the November 1985 hearing which would entitle him to any additional benefits.

The deputy commissioner's denial of additional benefits was confirmed in a final agency action. Upon judicial review, the district court upheld the agency action. Gallardo has now appealed.

Gallardo contends his evidence did show a change of condition between November 1985 (the hearing date on his first review-reopening petition) and April 1988 (the hearing date on his second review-reopening petition). He argues he is therefore entitled to additional workers'

compensation benefits on his second review-reopening petition. He argues the agency's denial of additional benefits was not supported by substantial evidence.

The scope of review in cases arising out of the Iowa Administrative Procedures Act is limited to the corrections of errors at law. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 165 (Iowa 1982). A district court decision rendered in an appellate capacity is reviewed to determine whether the district court correctly applied the law. Id. To make that determination this court applies the standards of section 17A.19(8) to the agency action to determine whether our conclusions are the same as the district court's. Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429-30 (Iowa 1979). The scope of review encompasses a review of the entire record and is not limited to the agency's findings. Higgins v. Iowa Dept. of Job Service, 350 N.W.2d 187, 191 (Iowa 1984).

Iowa Code section 17A.19(8)(f) provides in a contested case the court shall grant relief from an agency decision which is unsupported by substantial evidence made before the agency when that record is viewed as a whole. Eaton v. Iowa Dept. of Job Service, 376 N.W.2d 915, 916-17 (Iowa App. 1985). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. Id. at 917. The question is not whether the evidence might support a different finding but

whether the evidence supports the findings actually made. Henry v. Iowa Dept. of Job Service, 391 N.W.2d 731, 734 (Iowa App. 1986). The fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. Id.

The industrial commission hearing officers are uniquely qualified to apply the various considerations relating to industrial disability. We determine the industrial commissioner's decision is supported by substantial evidence. Further, we determine the industrial commissioner utilized the correct legal standard in reaching its decision. We affirm the trial court's ruling upholding the industrial commissioner's decision.

Costs of this appeal taxed to the appellant.

AFFIRMED.

Sackett, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent. I would find the industrial commissioner applied an incorrect legal standard in the second review reopening decision. The findings of fact and the rationale in that decision are based exclusively on the issue of Gallardo's physical disability. Factors considered in determining industrial disability are the claimant's age, education, qualifications, and extent to which injury precludes performance of employment for which claimant is suited. McSpadden v. Big Ben Coal Co., 228 N.W.2d 181, 192 (Iowa 1980). The commissioner did not account for these factors as they apply to Gallardo. Functional disability is a consideration, however, but is not the final criterion.

Id.

I would further find the evidence inadequate to support the industrial commissioner's ruling that Gallardo did not experience an increase in industrial disability. I base this finding on a substantial decrease in Gallardo's earning capacity subsequent to the original review reopening. The commissioner reasoned that Gallardo argued the same case at the second review reopening that he did at the first. This is simply inaccurate.

Firestone granted Gallardo a medical retirement subsequent to the original review reopening.

This fact indicates that Firestone determined for itself that Gallardo was therein unemployable as a result of his original on-the-job injury. The primary component of Gallardo's earning capacity was consequently eliminated. A change in earning capacity proximately caused by the original injury, and occurring subsequent to the original award, is a change in condition for purposes of increased workers' compensation. Blacksmith v. All American, Inc., 290 N.W.2d 348, 350 (Iowa 1980).

I would reverse the trial court and remand the case to the industrial commissioner for a determination of the extent of claimant's increased disability since the November 1985 hearing.