IN THE COURT OF APPEALS OF IOWA

FILED
JUN 29 1993
CLERK SUPREME COURT

No. 3-132 / 92-924

NANCY SIMONSON,
Petitioner-Appellant/Cross-Appellee

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vs.

SNAP-ON TOOLS CORPORATION and
ROYAL INSURANCE COMPANY,
Respondents-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Palo Alto County, Joseph J. Straub, Judge.

Nancy Simonson, a workers' compensation claimant, appeals a trial court's ruling on a petition for judicial review which affirmed in part and remanded in part the decision of the industrial commissioner. **AFFIRMED IN PART; MODIFIED IN PART; REVERSED IN PART; AND REMANDED TO THE COMMISSIONER IN PART.**

Mark S. Soldat, Algona, for appellant.

Paul C. Thune of Peddicord, Wharton, Thune & Spencer, P.C., Des Moines, for appellees.

Heard by Oxberger, C.J., and Sackett J. and Keefe, S.J.*

*Senior Judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

PER CURIAM

Petitioner-appellant Nancy Simonson was employed at respondent-appellee Snap-On Tools Corporation and allegedly suffered work-related injuries on July 5, 1985, November 6, 1986, and April 27, 1987. She filed separate workers' compensation claims claiming benefits for all three injuries. The cases were consolidated. The cases were submitted to a deputy, appealed to the industrial commissioner and ultimately a petition for judicial review was filed in the trial court. Nancy appeals and Snap-On Tools Corporation and respondent-appellee Royal Insurance Company cross-appeal from the trial court's decision. We affirm the trial court on Nancy's appeal. We affirm the commissioner; reverse the trial court on the employer's appeal; and remand to the commissioner with instructions.

Nancy Simonson began working for Snap-On Tools in 1979. She worked as a spot welder in the metal box department and in the brake press department. On or about July 5, 1985, Nancy claimed to suffer a work injury when she felt something pop in her back. Nancy was off work from July 5 through July 12, 1985, complaining of back and right leg pain. She returned to work on the following Monday without medical restrictions. Snap-On Tools voluntarily paid workers' compensation benefits. Simonson received her final payment for her July 5, 1985 work-related injury on July 19, 1985.

Nancy was off work because of back pain from November 6 through November 17, 1986. Nancy's treating physician gave the opinion her pain was the result of fatigue caused by lifting at work. Nancy's treating physician released her to return to work without restrictions on November 18, 1986. Again workers' compensation benefits were voluntarily paid.

Nancy claimed her back pain recurred in early 1987. Nancy missed seven consecutive days of work beginning May 4, 1987. Nancy's treating physician, Dr. Nelson, released her to return to light-duty work on July 21, 1987. Nancy claimed her symptoms continued to come and go depending upon the level of her activity. On April 13, 1988, Dr. Nelson gave the opinion Nancy had reached maximum medical improvement barring future surgery. On May 25, 1988, Nancy returned to Dr. Nelson who said she had reached the maximum medical improvement and she had sustained a four percent permanent partial impairment of the body as a whole. Dr. Nelson also imposed work restrictions on Nancy. On June 23, 1989, Snap-On Tools discharged Nancy because they did not have a job she could bid on that could be performed by a person with her medical restrictions.

After an arbitration hearing, a deputy industrial commissioner issued a proposed agency decision concluding Nancy's July 5, 1985 work-related injury was barred by Iowa Code section 85.26. The deputy rejected Nancy's argument the running of limitations under Iowa Code section 85.26

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was stopped by Snap-On Tools' failure to file a commencement of payments notice pursuant to Iowa Code section 86.13. The deputy found Snap-On Tools timely filed a notice of commencement of payments.

The deputy determined Nancy sustained a work-related injury on November 6, 1986, but concluded she sustained no permanent reduction in earning capacity as a result of the injury since Nancy returned to her same job without medical restrictions and continued working for years. The deputy also concluded Nancy proved she was entitled to temporary total disability benefits for the time she was off work as a result of the injury. The deputy ordered Snap-On Tools to pay a penalty for the unreasonable delay. Nancy received her final payment for her November 6, 1986 work-related injury on January 12, 1987.

Finally, the deputy determined Nancy sustained a work-related injury on May 4, 1987. The deputy concluded that healing period ended on May 26, 1988. The deputy then considered Nancy's age, education, prior work experience, among other things, and concluded Nancy sustained a permanent partial impairment of thirty-five percent. The deputy rejected Nancy's argument that her award should be based upon her life expectancy multiplied by the percentage of her industrial disability. The deputy also rejected any additional claims for penalty benefits finding the delays in processing Nancy's benefits did not appear unreasonable.

Nancy appealed and Snap-On Tools cross-appealed. The industrial commissioner adopted and affirmed the deputy's decision.

Nancy filed a petition for judicial review. The trial court concluded the industrial commissioner failed to discuss whether Nancy received notice of the commencement of payments as required under section 85.26(2) and remanded this issue. The trial court found the industrial commissioner's decision was ambiguous on the issue of injuries to specific body parts and remanded to the commissioner on this issue. The trial court also remanded the case for a determination of whether Nancy is entitled to Iowa Code section 85.39 benefits and to determine whether Nancy was entitled to certain healing period benefits. On the issue of permanent partial disability benefits, the trial court concluded the industrial commissioner, as a matter of law, failed to give adequate consideration to Nancy's earning differential. The trial court further concluded the industrial commissioner erred in determining the commencement date for permanent partial disability benefits and held permanent partial disability benefits should start on May 13, 1987. Finally, the trial court affirmed the industrial commissioner's decision on the issue of penalty benefits. The trial court taxed one-fourth of the costs to Nancy. From this decision Nancy has appealed and Snap-On Tools has cross-appealed. Our review is limited to the correction of errors at law.

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Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 165 (Iowa 1982).

Nancy first contends her claim for injuries sustained on July 5, 1985, was not barred by the statute of limitations. The commissioner found Nancy sustained a work-related injury on July 5, 1985, and was paid weekly benefits for the injury through July 19, 1985. Nancy did not file a petition for this injury until December 29, 1988, more than three years after the last weekly payment was made. Iowa Code section 85.26 provides an original proceeding for benefits shall not be maintained in any contested case if weekly benefits have been paid unless the proceeding is commenced within three years of the date of the last payment of weekly compensation benefits. However, section 85.26(2) provides if a denial of liability is not filed with the industrial commissioner and notice of the denial is not mailed to the employee within six months of the commencement of weekly compensation benefits, the commissioner may at any time upon proper application[1] make a determination and appropriate order concerning the entitlement of an employee to benefits provided for in section 85.27 which is the section that provides for professional and hospital services.

Nancy contends we should make a plain judicial pronouncement that because the July 5, 1985 injury was found to be work-related and she received compensation and

(1) The statute does not define proper application.

the commissioner did not take judicial notice of any official record showing Snap-On had denied liability, that she is entitled as a matter of law to lifetime section 85.27 benefits. The only injury Nancy claims to have sustained in 1985 was to her lower back which she is entitled to benefits for as a result of the May 4, 1987 injury. We find it not necessary, therefore, to address this issue. We affirm the commissioner on this issue.

Nancy's second contention is she was entitled to more healing period benefits. Nancy contends the uncontroverted evidence was the August 3, 1987 to August 16, 1987 and the September 14, 1987 to September 20, 1987 and the January 29, 1988 to February 28, 1988 periods were temporary partial disability periods and, consequently, this should be held as a matter of law. As to the August 3, 1987 to August 16, 1987 claim, Nancy has been paid temporary partial disability benefits for August 3 through the fourteenth. Respondents agree the case should be remanded to the commissioner to determine the correct amount of temporary partial disability under 85.33(4) for the weekend days of August 15 and 16. As to all other claims on this issue, we affirm the commissioner.

Nancy's third contention is the trial court erred in affirming the commissioner's failure to award section 86.13 penalties for the delays in the temporary disability compensation payments. Nancy contends she is entitled to a penalty award under section 86.13 due to the frequent

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delays in paying healing period and temporary partial disability benefits.

Respondents contend the trial court did not err in upholding the industrial commissioner's refusal to award an 86.13 penalty in connection with the payment of healing period benefits. Iowa Code section 86.13 (1988), in pertinent part, provides:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied. (Emphasis supplied.)

This section clearly applies only to a delay in commencement or termination of benefits. We affirm on this issue.

Nancy's fourth contention is the trial court erred in affirming the commissioner's alleged failure to show how he had concluded she had no more than a thirty-five percent earning capacity loss. Nancy further contends the trial court erred in failing to determine as a matter of law that she had no less than a 53.5 percent earning capacity loss and in affirming the commissioner's failure to implement a correlation between permanent partial and total disabilities compensation.

Respondents contend the trial court erred in failing to affirm the appeal decision of the industrial commissioner in all respects with regard to the issue of claimant's

industrial disability. The trial court ordered the appeal decision remanded to the commissioner to calculate the percentage of Nancy's industrial disability in a manner that gives sufficient weight to the earnings differential factor. Respondents contend the commissioner did consider this factor in evaluating the extent of industrial disability and the trial court erred in remanding the appeal decision back to the commissioner for this determination.

Functional impairment is an element which must be considered in determining industrial disability or the reduction of a worker's earning capacity. Consideration must also be given to other factors such as the worker's age, education, qualifications, experience, and inability to engage in employment for which he or she is fitted. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 179 (Iowa 1979); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963).

The commissioner's decision shows all of these factors were considered in determining the extent of Nancy's industrial disability.

There is no formula or precise method which can be applied in arriving at the extent of industrial disability. Each case must be decided according to its unique facts. The trial court and commissioner considered all of the factors set forth in Olson. When there is a challenge to an agency's interpretation of statute

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governing its work, the agency's expertise is entitled to deference. Ford v. Iowa Dep't Human Servs., No. 51/92-362, slip op. at 12-13 (Iowa May 19, 1993).

Nancy argues we should conclude as a matter of law that her industrial disability is at least 53.5 percent given the evidence of her pre- and post- injury earnings. The trial court ordered this case remanded to the commissioner so "sufficient weight" could be given to the difference in pre- and post- injury earnings in arriving at a determination of the extent of industrial disability.

Nancy's theory is her industrial disability should be determined in relation to her life expectancy rather than the 500 week limit set forth in Iowa Code section 85.34(2). We look to Iowa Code section 85.34 which, in pertinent part, provides:

> Compensation for permanent disabilities and during a healing period of permanent partial disabilities shall be payable to an employee as provided in this section. In the event weekly compensation under section 85.33 had been paid to any person for the same injury producing a permanent partial disability, any such amounts so paid shall be deducted from the amount of compensation payable for the healing period.
> 1. **Healing period.** If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

> 2. **Permanent partial disabilities.** Compensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1 of this section. The compensation shall be in addition to the benefits provided by sections 85.27 and 85.28. The compensation shall be based upon the extent of the disability and upon the basis of eighty percent per week of the employee's average weekly spendable earnings, but not more than a weekly benefit amount, rounded to the nearest dollar, equal to sixty-one and one-third percent of the statewide average weekly wage paid employees as determined by the department of employment services under section 96.19, subsection 42, and in effect at the time of the injury. However, as of July 1, 1975; July 1, 1977; July 1, 1979; and July 1, 1981, the maximum weekly benefit amount rounded to the nearest dollar shall be increased so that it equals ninety-two percent, one hundred twenty-two and two-thirds percent, one hundred fifty-three and one-third percent, and one hundred eighty-four percent, respectively, of the statewide average weekly wage as determined above. The minimum weekly benefit amount shall be equal to the weekly benefit amount of a person whose gross weekly earnings are thirty-five percent of the statewide average weekly wage, or to the spendable weekly earnings of the employee, whichever are less. . . . For all cases of permanent partial disability compensation shall be paid as follows:
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> 3. In all cases of permanent partial disability . . . the compensation shall be paid during the number of weeks in relation to five hundred weeks as the disability bears to the body of the injured employee as a whole.
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> If it is determined that an injury has produced a disability less than that specifically described in said schedule, compensation shall be paid during the lesser number of weeks of disability determined, as will not exceed a total amount equal to the same percentage proportion of said scheduled maximum compensation.

If an employee sustains a non-scheduled injury to the body as a whole, he or she is entitled to receive benefits "during the number of weeks in relation to 500 weeks as the disability bears to the body of the injured employee as a

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whole." Iowa Code section 85.34(2). If the injured employee sustains a permanent total disability, then he or she is entitled to weekly compensation "during the period of the employee's disability." Iowa Code section 85.34.

Nancy has not shown she is permanently and totally disabled from her work injury. However, she argues she is entitled to the percentage of disability multiplied by her life expectancy (which in this case is much greater than 500 week limit set forth in Iowa Code section 85.34(2)).

This theory is not consistent with Iowa statutory law and Nancy has not cited any authority in support of her proposition that would support this court recognizing her theory.

The trial court erred in remanding the case back to the commissioner for this determination. The difference in earnings before and after the injury is simply one factor to be taken into consideration in determining the extent of industrial disability. Olson, 255 Iowa at 1120, 125 N.W.2d at 256. The industrial commissioner did consider this factor in evaluating the extent of industrial disability. We reverse the trial court on this issue and affirm the commissioner.

Nancy contends the trial court erred in affirming the commissioner's failure to award section 86.13 penalties for the delays in permanent disability compensation payments.

Respondents contend the trial court's refusal to award a section 86.13 penalty in connection with the payment of

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permanent partial disability benefits is supported by substantial evidence.

The question is whether there is sufficient evidence to support the finding of the commissioner and the trial court that it was reasonable for respondents not to pay Nancy more than four percent disability until the time of hearing. In July 1987, there was a medical report that indicated Nancy could expect full recovery and no permanent impairment was anticipated. In November 1987, an orthopedic evaluation of Nancy was normal in all respects. There is substantial evidence supporting these factual findings. See Gallardo v. Firestone Tire & Rubber Co., 482 N.W.2d 393, 395 (Iowa 1992).

Nancy contends the trial court erred by taxing one-quarter of the costs against her. She contends the trial court had the discretion to tax, but it did not have the discretion to tax without explanation.

Respondents contend the trial court erred in taxing only one-quarter of the judicial review costs against Nancy. Respondents contend this was an abuse of discretion.

The question is whether the trial court abused its discretion. Matters committed to the discretion of a lower court are not reviewable upon appeal; only the alleged abuse of that power is reviewable. State v. Frank, 298 N.W.2d 324, 327 (Iowa 1980). For us to find an abuse of discretion in a trial court ruling, it must be shown by the

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complaining party that the trial court's action was unreasonable under the attendant circumstances. Michael v. Harrison County Rural Elec. Coop., 292 N.W.2d 417, 419 (Iowa 1980). Generally, abuse of discretion will be found only where there is no support in the record for the trial court's action. Kreamer v. College of Osteopathic Medicine and Surgery, 301 N.W.2d 698, 700 (Iowa 1981); Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972). We find the trial court did not abuse its discretion.

We affirm the decision of the commissioner in all respects except we remand to the commissioner for the limited purpose of determining partial disability under 85.33(4) for the weekend days of August 15 and 16, 1987.

AFFIRMED IN PART; MODIFIED IN PART; REVERSED IN PART; AND REMANDED IN PART TO THE COMMISSIONER.