IN THE COURT OF APPEALS OF IOWA

No 5-582 / 94-1978

MICHAEL CONRAD,

Petitioner-Appellee,

vs.

ENVIRONMENTAL MANAGEMENT SERVICES, and AETNA INSURANCE COMPANY,

Respondents-Appellants.

FILED
MAY 31 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge

Respondents appeal from the district court's ruling on judicial review reversing the Industrial Commissioner's decision awarding workers' compensation benefits to petitioner **DISTRICT COURT REVERSED; INDUSTRIAL COMMISSIONER AFFIRMED.**

Carole J. Anderson of Lane & Waterman, Davenport, for appellants.

James M. Hood, Davenport, for appellee

Considered by Sackett, P.J., and Habhab and Cady, JJ. Vogel, J., takes no part.

SACKETT, P.J.

The question in this appeal is the weekly rate claimant-petitioner-appellee Michael Conrad should receive as a result of an alleged injury he received while working for respondent-appellant Environmental Management Services. Respondent appeals, as does their insurance carrier respondent-appellant Aetna Insurance Company.

Claimant filed a petition before the Industrial Commissioner. The matter was scheduled for hearing before a deputy industrial commissioner. The deputy set claimant's weekly rate at $481.68. Respondents appealed to the Industrial Commissioner and the Commissioner set claimant's rate at $284.86 weekly.

Claimant filed a petition for judicial review in the district court asking the court to reverse the Commissioner and reinstate the weekly rate determined by the deputy. The district court agreed with claimant and reinstated the weekly rate set by the deputy. This appeal follows. Respondents contend the district court erred in reinstating the decision of the deputy and reversing the Commissioner. We agree and reverse the district court and affirm the Commissioner.

First, we address respondents' contention the trial court erred in reinstating the deputy's decision. An arbitration decision of a deputy is only a proposed agency decision within the contemplation of Iowa Code section 17A.15(2). *Tussing v. George A. Hormel & Co.*, 461 N.W.2d 450, 451-52 (Iowa 1990). The Industrial Commissioner's decision after a de novo review is the agency's decision. *Id.* When

the Commissioner's decision is issued, the deputy's decision is no longer a viable step in the proceedings. *Id.* The trial court erred in reinstating the deputy's decision.

We next look at respondents' claim the trial court erred in finding the Commissioner incorrectly determined claimant had not given sufficient notice the weekly rate would be an issue at the hearing before the deputy. Respondents contend the trial court erred in finding the Commissioner erred on this issue. Respondents advance even if the Commissioner did err in finding claimant had not given sufficient notice of the weekly rate issue, the Commissioner's determination of the weekly rate is supported by substantial evidence in the record. We are bound by the findings of the agency if those findings are supported by substantial evidence. *James v. Sheller Globe Corp.*, 510 N.W.2d 170, 172 (Iowa App. 1993). We find the Commissioner's determination of the weekly rate is supported by substantial evidence and find it unnecessary to determine whether or not the rate of pay was an issue before the deputy.

Claimant had only worked for respondent employer for four hours when he was allegedly injured. Consequently, claimant's rate is established under Iowa Code section 85.36(7), which provides:

> In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, the employee's weekly earnings shall be computed under subsection 6, taking the earnings, not including overtimes or premium pay, for such purpose to be the amount the employee would have earned had the employee been so employed by the employer the full thirteen calendar

> weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

Iowa Code § 85.36(7) (1993).

To accept the deputy's computation of the weekly rate, the fact finder would need to find claimant would have worked twelve hours per day for thirteen weeks at $11.00 per hour.

Although claimant contended a hiring foreman, who he identified only as Jessie, had told him he would work this much, it was conceded claimant had been only hired as a temporary employee and had worked only four hours. Claimant admitted he had no contract, did not know how long the job would last, and had no personal knowledge how many people were hired or how often or how long they worked.

The Commissioner specifically found claimant had accepted the rate he determined without challenge for two and one-half years, and claimant offered no evidence of earnings of comparable employees in the thirteen weeks prior to his alleged injury. The Commissioner did not have to accept the alleged statements of the foreman identified only as Jessie. The Commissioner's findings are supported by substantial evidence.

We reverse the district court and affirm the Industrial Commissioner.

DISTRICT COURT REVERSED; INDUSTRIAL COMMISSIONER AFFIRMED.