IN THE COURT OF APPEALS OF IOWA

No. 0-474 / 90-224

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CLERK SUPREME COURT

SHELLER-GLOBE CORPORATION,

Appellant,

364

vs.

PAMELA ATTERBERG,

Appellee.

Appeal from the Iowa District Court for Polk County, Theodore H. Miller, Judge.

Respondent injured her back while working for petitioner. The industrial commissioner determined that respondent had a 5% industrial disability from a previous non-work-related injury and a 45% industrial disability after the work-related injury. On judicial review, the district court affirmed the commissioner. The employer now appeals. It claims that respondent's injury did not arise in the course of her employment and that the award of industrial disability was excessive. **AFFIRMED.**

W. Dahl, Des Moines, for appellant.

James P. Hoffman, Keokuk, for appellee.

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

DONIELSON, P.J.

Respondent Pamela Atterberg was employed by Sheller-Globe Corporation as an assembly worker. She has a congenital back condition and injured her back at home in 1985. Pamela's treating physician, Dr. Pontarelli, performed a laminectomy and lumbar decompression in May 1985. The results of Pamela's surgery were characterized as excellent by her treating physicians. Pamela returned to work in January 1986. Pamela testified at the hearing that at the time of her return to work, her leg pain had completely disappeared, she was on no medication, and no longer limped. Pamela testified she was able to engage in such activities as swimming, baseball, carrying firewood, and mowing the lawn.

Her work as a conveyor belt operator at Sheller-Globe materially aggravated her preexisting back condition and forced her to leave work on February 19, 1986. The pain originated in her middle back, past the point of her prior surgery, and down her left leg. Dr. Pontarelli determined Pamela had a ligamentous sprain and determined she was unable to work until June 1986. After a day and a half, Pamela's back became too sore to work. Sheller-Globe subsequently refused to rehire Pamela on the ground that her return to work would aggravate her already-serious back condition.

Pamela subsequently found employment with Site's gas station earning $3.50 per hour. Pamela had earned over

$10.00 per hour at Sheller-Globe. Her duties at the gas station consist of waiting on customers, general cleaning, and stocking the soda cooler. Pamela has few marketable skills besides manual labor and has no education beyond her GED.

Pamela filed a claim for workers' compensation benefits. The industrial commissioner determined that Pamela's whole body impairment is attributable in part to her work-related injury. The commissioner found that she had an industrial disability of 5% prior to the work-related injury and that her current industrial disability is 45%. Sheller-Globe filed a petition for judicial review. The district court affirmed the commissioner. Sheller-Globe now appeals.

Sheller-Globe contends that Pamela failed to establish a causal connection between her condition and her employment with Sheller-Globe. It believes that her work did not materially aggravate a preexisting condition and that Pamela's condition arose because of her preexisting congenital back problems and surgery.

Sheller-Globe also contends that the award of 40% industrial disability due to the work injury was excessive. It asserts that the commissioner erred in not assigning a greater part of the industrial disability to the 1985 injury. It feels it should not be penalized for refusing to allow Pamela to return to work which could be dangerous to her. We affirm.

We review the present case in the manner specified in Iowa Code section 17A.19(8). Our review is therefore limited to the record made before the agency officer. Hainey v. Protein Blenders, Inc., 445 N.W.2d 398, 399 (Iowa App. 1989). We will uphold those findings of fact made by the agency if they are supported by substantial evidence in the record made before the agency when the record is viewed as a whole. Id. We may not substitute our own judgment for that of the agency. McClure v. Iowa Real Estate Commission, 356 N.W.2d 594, 597 (Iowa App. 1984). A finding may be supported by substantial evidence even though reasonable minds may differ and a contrary finding could be reached. Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 63 (Iowa App. 1981).

Sheller-Globe first argues the district court erred in finding that Pamela sustained an injury which arose out of and in the course of her employment. Sheller-Globe maintains the most glaring error is evidenced by the industrial commissioner's finding that Pamela's work on the conveyor belt system aggravated her preexisting condition, yet also found that the pain experienced by Pamela on February 19, 1986, originated in an area of her back different from that originally injured. Sheller-Globe also contends there is no evidence in the record to support the agency's finding that the injuries sustained by Pamela were material or permanent. We disagree.

The Iowa Supreme Court addressed this issue in Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa 1981). Citing an earlier opinion, Musselman v. Central Telephone Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967), the court stated:

> This court has previously held, if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened or "lighted up" by an injury which arose out and in the course of employment resulting in a disability found to exist, he would be accordingly entitled to compensation. See Nicks v. Davenport Produce Co., 254 Iowa 130, 134-35, 115 N.W.2d 812, and citations.
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> However, a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only where there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. Littell v. Lagomarcine Grupe Co., 235 Iowa 523, 529, 17 N.W.2d 120, and citations. See also California Notion & Toy Co. v. Industrial Acc. Commission, 59 Cal. App. 225, 210 P. 524, and Annos. 19 A.L.R. 101; 28 A.L.R. 206; 80 A.L.R. 1304.

312 N.W.2d at 64.

Under the above standard, an injury arises out of the employment where there is a causal relationship between the employment and the injury. Sheerin v. Holin Co., 380 N.W.2d 415, 417 (Iowa 1986). It only needs to be one cause; it does not have to be the only cause. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

The hearing officer determined following the March 1988 hearing that Pamela had been performing work which required

a high rate of speed and that such work should have been performed by more than one person. The hearing officer determined that based on Pamela's description of her activities before and after she returned to work, plus the medical testimony of the physicians who had examined her, Pamela's present condition was caused by her congenital back condition resulting from the 1985 fall and the type of work she was performing at the time of the latest injury.

The medical testimony offered at the hearing also indicates that Pamela's injuries were aggravated by her employment. Dr. Pontarelli testified Pamela's current condition was received after she returned to work. Dr. Gary Crank testified that although he believed Pamela's condition was attributable to her prior surgery, Pamela's work activity would affect her symptoms. Dr. Worrell also testified that Pamela's condition was aggravated by her working conditions. Dr. Worrell assigned Pamela a permanent partial disability rating of 5-8%. None of the other doctors who testified gave any causation of Pamela's condition. The sum of the medical testimony indicated Pamela would be able to return to work, but that she would not be able to lift heavy loads or work at a position which required a lot of bending or rotating.

We cannot say upon reviewing the record as a whole that the industrial commissioner's conclusion that Pamela's employment activity was a factor in causing her disability is unsupported by substantial evidence. Furthermore, the

evidence Sheller-Globe argues compels another result is not determinative of the issue, as we have previously noted the crucial question is whether there is sufficient evidence to warrant the decision made by the industrial commissioner. We find there is substantial evidence to support the commissioner's findings.

Sheller-Globe additionally argues the district court erred in affirming the industrial commissioner's award of 40% industrial disability because it is excessive under the law and facts of this case. Sheller-Globe maintains Pamela already had a serious back condition and to apportion only 5% of the disability to her preexisting back condition is contrary to the evidence.

Our courts have recognized that the term "disability" is meant to include "industrial disability" or earning capacity, and not mere "functional disability", and that it is to be computed in terms of percentage of the total physical and mental ability of a normal worker. Armstrong v. State of Iowa Bldgs., 382 N.W.2d 161, 166 (Iowa 1986). In determining disability, we look at the claimant's age, education, qualifications, experience, and inability, due to injury, to engage in suitable employment. Id. We additionally look to the efforts of the claimant in looking for work and the availability of suitable employment. Guyton v. Irving Jenson Co., 373 N.W.2d 101, 103 (Iowa 1985). In order to disturb the commissioner's finding, the employer must establish that the evidence required a

different finding as a matter of law. Frit Industries v. Langenwalter, 443 N.W.2d 88, 91 (Iowa App. 1989).

The deputy commissioner found a 75% disability without making an apportionment for the preexisting condition. The industrial commissioner on appeal reduced this finding to 45%, apportioning 5% of the disability to Pamela's preexisting condition. The record reveals Pamela has minimal education. Pamela has no advanced technical training beyond manual labor-intensive jobs. There was evidence introduced at the hearing that the economy of the area is poor, with 10 and 1/2% unemployment. Pamela has been characterized as being highly motivated in looking for work, but was unable to find another job which equaled her pay from Sheller-Globe of $10.36 per hour. Pamela finally settled for a job at Site's gas station, earning $3.50 per hour, without any benefits. Sheller-Globe refused to rehire Pamela, even though testimony at the hearing indicated there were jobs available that would not be as stressful or aggravating to her existing condition. We find these facts sufficient to support the industrial commissioner's ruling Pamela should receive a 45% disability rating.

We therefore affirm the industrial commissioner's award of benefits.

AFFIRMED.