IN THE COURT OF APPEALS OF IOWA

No. 1999-512 (9-769) / 99-646
Filed October 25, 2000

PACKERS SANITATION SERVICE and LIBERTY MUTUAL,
Petitioners-Appellants,

vs.

MIKE TREINEN,
Respondent-Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

The petitioners appeal from the district court's ruling on judicial review affirming the industrial commissioner's decision that respondent was permanently and totally disabled under the "odd-lot" doctrine. **AFFIRMED.**

Richard G. Book of Huber, Book, Cortese, Happe & Brown, P.L.C., Des Moines, for appellants.

Colin J. McCullough of McCullough Law Firm, Sac City, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

HUITINK, P.J.

Overview. The former employer and its insurance company appeal the district court's decision on judicial review, affirming the industrial commissioner's determination that Treinen is permanently and totally disabled under the "odd-lot" doctrine. They claim the court erred in affirming the award because Treinen's failure to obtain employment does not constitute a change in condition, and the determination that Treinen is an odd-lot employee was based on an erroneous legal standard and not supported by substantial evidence. We affirm the district court.

Background facts and proceedings. In May 1987 Mike Treinen injured his right shoulder and arm when operating a high-pressure water hose while in the employ of Packers Sanitation Service. After agency appeals, the district court affirmed an award of permanent partial disability of sixty-five percent of the body in January 1993. In December 1994 Treinen filed a review-reopening petition with the industrial commissioner seeking additional benefits. A deputy industrial commissioner found Treinen had incurred a change in condition caused by his work injury and he was permanently and totally disabled under the odd-lot-employee doctrine. The industrial commissioner affirmed the award of permanent total disability benefits. Packers and Liberty Mutual sought judicial review. The district court affirmed the decision of the industrial commissioner. Packers appeals.

Scope of review. Our scope of review is for correction of errors of law. *King v. City of Mt. Pleasant*, 474 N.W.2d 564, 565-66 (Iowa 1991). In

determining whether the district court erred in exercising its power of judicial review, we apply the standards of Iowa Code section 17A.19(8) to the agency action to determine whether our conclusions are the same as those reached by the district court. *E.N.T. Assocs. v. Collentine*, 525 N.W.2d 827, 829 (Iowa 1994). On review, the industrial commissioner's findings of fact are binding on us if reasonable minds can draw different inferences from the evidence or if the evidence is in dispute. *Gallardo v. Firestone Tire & Rubber Co.*, 482 N.W.2d 393, 395 (Iowa 1992). The test is whether the commissioner's decision is supported by substantial evidence. *Id.* at 395.

Appellate claims. Packers claims Treinen's failure to obtain employment during the time since the original award does not constitute a change in condition entitling him to additional benefits because he was unemployed at the time of the original award. Packers also claims the commissioner's determination that Treinen is an odd-lot employee is based on an erroneous legal standard and not supported by substantial evidence.

Discussion. In a review-reopening proceeding under Iowa Code section 86.14(2), the industrial commissioner determines whether or not the condition of the claimant warrants an increase in, decrease in, or end to benefits. Iowa Code § 86.14(2); *E.N.T. Assocs.*, 525 N.W.2d at 829. The claimant must establish he has suffered an impairment or lessening of earning capacity caused by the original injury which occurred subsequent to the award under review. *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348, 350 (Iowa 1980). The claimant need not

prove a change in physical condition. *U.S. West Communications, Inc. v. Overholser*, 566 N.W.2d 873, 875 (Iowa 1997).

In the 1992 appeal decision the commissioner concluded, "There are jobs available in claimant's community that claimant could perform, and employers willing to hire him . . . . However, claimant has also shown poor motivation to find substitute work within his capabilities." In the 1998 appeal decision from the review-reopening proceeding, the commissioner concluded, "The evidence in this case supports a finding there has been a change of economic conditions since the issuance of the prior final agency decision." Analyzing Treinen's circumstances over the four years since the earlier decision, utilizing the odd-lot employee analysis set forth in *Guyton v. Irving Jenson Co.*, 373 N.W.2d 101, 106 (Iowa 1985), the commissioner determined Treinen had made a prima facie case of total disability. He made repeated efforts to secure employment, but was unsuccessful. The local workforce development center was unable to provide job leads. Under *Guyton*, once a claimant presents a prima facie case for inclusion in the odd-lot category, the burden of production switches to the former employer to show the availability of suitable employment. *Guyton*, 373 N.W.2d at 105 (quoting *Employers Mutual Life Ins. Co. v. Industrial Comm'n*, 25 Ariz. App. 117, 119, 541 P.2d 580, 582 (1975)).

The industrial commissioner concluded Packers, while maintaining jobs were available to Treinen, did not present potential employment to him. Packers argues the commissioner used an erroneous legal standard and the decision is not supported by substantial evidence. We disagree. At best, the evidence

could be read as showing there might, at some time in the future, be a suitable position for Treinen. His inability to sustain the physical duties of full-time employment and his recurring periods of total incapacity place Treinen in a position that the services he can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." *Id.* (quoting *Lee v. Minneapolis St. Ry.*, 230 Minn. 315, 41 N.W.2d 433, 436 (1950). We conclude the commissioner did not apply an erroneous legal standard. The decision Treinen is an odd-lot employee, and hence, totally disabled, is supported by substantial evidence. The commissioner's determination Treinen's circumstances since the original award have changed is supported by substantial evidence in the record.

Because our conclusions, after review of the commissioner's decision, are the same as those of the district court, we affirm. *See E.N.T. Assocs.*, 525 N.W.2d at 829.

AFFIRMED.