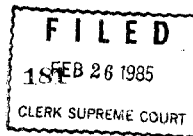


IN THE COURT OF APPEALS OF IOWA



FRANK GUYTON, JR.,)

Petitioner-Appellant,)

Filed February 26, 1985

vs.)

IRVING JENSEN COMPANY,)

Respondent-Appellee,)

and)

CHUB PACIFIC INDEMNITY CO.,)

4-534
84-514

Respondent,)

and)

IOWA INDUSTRIAL COMMISSIONER,)

Respondent.)

Appeal from the Iowa District Court for Black Hawk County - William G. Klotzbach, Judge.

Petitioner appeals the court's affirmance of the industrial commissioner's decision on his disability compensation. REVERSED.

Robert D. Fulton of Fulton, Frerichs, Martin & Andres, P.C., Waterloo, for petitioner-appellant.

Jay P. Roberts and Jim D. Dekoster of Swisher & Cohrt, Waterloo, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson and Snell, JJ.

Petitioner appeals from the judgment of the district court affirming the industrial commissioner's decision on his disability compensation. He asserts 1) that the industrial commissioner applied an incorrect rule of law in equating industrial disability with functional disability, 2) that the commissioner's decision was not supported by substantial evidence, and 3) that since claimant established he was an "odd lot employee," the burden should shift to the employer to establish that suitable employment was available. We reverse.

Frank Guyton, Jr., the petitioner in this action, was employed as a construction laborer by Irving Jensen Company from May 1, 1978 until June 23, 1978. On May 9, 1978, he was injured when a pick-up truck driven by a co-worker struck him in the left hip. Petitioner continued to work and in the following few days his back became stiff. Jensen sent petitioner to a company doctor who took x-rays and prescribed pain pills.

Guyton was then referred to an orthopedic surgeon who examined him on three occasions. The orthopedic surgeon stated that petitioner suffered from a back sprain, but he could resume work as of August 14, 1978.

Mr. Guyton was paid temporary healing benefits from June 26, 1978 until August 14, 1978. In February, 1981, he filed his petition for review reopening to determine the nature and extent of the disability. Prior to the hearing in June of 1981, the petitioner was examined by several orthopedic surgeons, a psychologist, and a vocational expert.

Guyton was initially examined by the orthopedic staff at the University of Iowa hospitals. One member of the staff concluded that petitioner's healing period was over and that he had a 20 percent impairment of the whole body. Another member of the staff stated that he had a 5 percent whole body impairment.

In October 1981, Guyton was examined by James E. Crouse, M.D. Dr. Crouse

thought that the petitioner had sustained low back strain. The following month, Arnold E. Delbridge, M.D., examined and hospitalized the petitioner. Dr. Delbridge stated that petitioner would have difficulty doing any type of work involving bending, prolonged sitting, or lifting as little as 10 to 15 pounds. He further determined that petitioner was 15 percent impaired.

A psychological examination revealed that the petitioner functioned in a mild mentally retarded range of intellectual ability. The psychologist concluded that the petitioner would be limited to employment of an unskilled repetitive nature.

A vocational expert who testified at the hearing stated that Guyton was 100 percent vocationally disabled. She based her opinion on medical records, the psychological examinations, interviews with Mr. Guyton, and records of Mr. Guyton's work history. Testimony at the hearing also revealed that the petitioner has been unable to secure employment.

After the review-reopening hearing, a deputy industrial commissioner found that as a result of the injuries sustained in the accident, petitioner had industrial disability to the extent of 20 percent of the body as a whole. On appeal to the industrial commissioner, another deputy industrial commissioner cited the applicable law for determining industrial disability and also stated that the Iowa Supreme Court never held that the burden of proof shifts to the employer when a claimant demonstrates that he can be covered by the "odd lot doctrine." The appeal decision basically affirmed the review-reopening decision.

A review of the industrial commissioner's decision is governed by Iowa Code section 17A.19. Beier Glass Co. v. Brundige, 329 N.W.2d 280, 282 (Iowa 1983). Our duty is to correct errors of law made by the district court. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa Ct. App. 1984). In doing so, we apply the standards set forth in section 17A.19(8) to the agency action and determine whether our conclusions are the same as the district court's. Gipson v.

Iowa Dep't of Job Service, 315 N.W.2d 834, 836 (Iowa Ct. App. 1981). Findings of fact by the industrial commissioner are considered binding; however, questions of law are not conclusive and are subject to review. Thomas, 349 N.W.2d at 125.

Petitioner first claims that the industrial commissioner applied an incorrect rule of law in equating physical disability with industrial disability.

Physical or functional disability is assessed by determining "the impairment of the body function of the employee." Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983). However, the type of disability covered by worker's compensation laws in Iowa is not limited to an assessment of bodily injury. Rather, when a non-scheduled injury is involved, chapter 85A of the Iowa Code allows compensation for what has been termed industrial disability or a reduction in earning capacity. Id. The criteria for gauging the extent of industrial disability include the age of the claimant, education, qualification, experience, and inability, due to injury, to engage in the employment for which the claimant is fitted. Doerfer Division of CCA v. Nicol, No. 83-755, slip op. at 23 (Iowa Dec. 19, 1984); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980).

A review of the record before this court leads us to conclude that the industrial commissioner applied the correct law. The commissioner's appeal decision sets forth the appropriate factors to be considered when determining industrial disability. Moreover, the commissioner's analysis was not limited to a discussion of the petitioner's physical disability. The petitioner's age, intellect, and ability to do work within his capabilities were also considered.

Petitioner also argues that the agency decision was not supported by substantial evidence. He claims that as a matter of law it was established that he is permanently and totally disabled. We are inclined to agree.

Evidence is considered substantial when a reasonable mind would accept it as adequate to reach a conclusion. McConnell v. Iowa Dep't of Job Service, 327 N.W.2d 234, 236 (Iowa 1982). "The mere possibility that the record would support

another conclusion does not permit the district court or this court to make a finding inconsistent with the agency findings so long as there is substantial evidence to support it." Peoples Memorial Hospital v. Iowa Civil Rights Comm'n, 322 N.W.2d 87, 91 (Iowa 1982) (citing Woods v. Iowa Dep't of Job Service, 315 N.W.2d 838, 841 (Iowa Ct. App. 1981)).

The petitioner is an uneducated 41-year-old man who is mentally retarded. The record shows that he is unable to read, write, tell time, or make change. Prior to his injury, Mr. Guyton was qualified for unskilled, elemental work. In other words, he could perform routine work requiring little training or experience. In the past, Mr. Guyton has worked as a farm laborer, a forklift operator, a janitor, and a garbage man. However, due to his injury, he now has physical limitations which would make employment extremely unlikely. The record reflects that he is unable to do work which involves bending, prolonged sitting, or repetitive lifting of anything weighing more than 5 to 15 pounds.

Marian Jacobs, a vocational consultant, submitted a report which indicates that Mr. Guyton's physical limitations, combined with his elemental work skills, poor communication skills, and illiteracy, lead to the conclusion that he is 100 percent vocationally disabled. In other words, he is unable to engage in employment for which he is fitted.

Additionally, it is apparent from the record that the petitioner has been unable to secure employment of any kind, although he has contacted several employers for possible jobs.

The respondent argues that there is considerable evidence that Mr. Guyton has performed heavy work since his injury. A private investigator hired by the respondent observed and photographed the petitioner for several days in June 1982. The record reflects that Mr. Guyton was observed loading box springs and other miscellaneous items onto a pickup truck. He was also seen unloading a Rototiller from a truck.

From this evidence, it is apparent that the petitioner is not completely incapacitated. However, a finding of total disability for purposes of worker's compensation does not require that the claimant be utterly helpless. Larsen's Workers' Compensation Law, section 57.51, states in part:

Evidence that the Claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial. The task is to phrase a rule limiting the amount and character of work a man can be able to do without forfeiting his total disabled status. The rule followed by most modern courts has been well summarized by Justice Madsen of the Minnesota Supreme Court in the following language:

An employee who is so injured that he can perform no services other than those which are so limited in quality and dependability or quantity that a reasonably stable market for them does not exist may well be classified as totally disabled.

It is evident from the record that although Mr. Guyton is not totally incapacitated, for purposes of worker's compensation law he is totally disabled. Since the accident he has been observed lifting items into a pickup truck. Yet there is no indication that he could perform such tasks on a regular basis. In fact, medical evidence would indicate to the contrary. Petitioner's skills and ability are so limited that a market for them does not exist.

For the aforementioned reasons, we conclude that the agency determination that Mr. Guyton is 20 percent disabled is not supported by the record. Reasonable minds would not accept the evidence as adequate to reach this conclusion. Accordingly, we reverse the decision of the district court and the industrial commissioner and hold that the petitioner is permanently and totally disabled.

The petitioner's final argument is that we should adopt a position that once a claimant establishes himself as an "odd lot employee," the burden should shift to the employer to show that suitable employment is available. Because of our disposition on the previous issues, we find it unnecessary to consider this claim.

REVERSED.