

IN THE COURT OF APPEALS OF IOWA

No. 3-381 / 92-1858

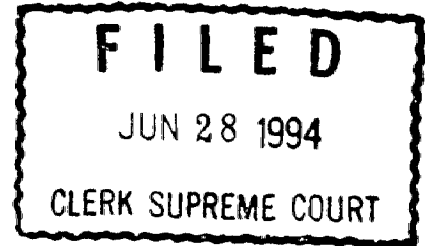
KIMBERLY QUALITY CARE, Employer, and
GALLAGHER BASSETT SERVICES, Adjusting Firm,

Appellants,

vs.

RADA CAMPBELL,

Appellee.



Appeal from the Iowa District Court for Polk County,
Richard A. Strickler, Judge.

Employer appeals the decision of the district court
affirming the Industrial Commissioner's determination of
claimant's rate of compensation. **AFFIRMED.**

Lee P. Hook and Joseph M. Barron of Peddicord, Wharton,
Thune & Spencer, P.C., Des Moines, for appellants.

David D. Drake of Lawyer, Lawyer, Dutton & Drake,
Des Moines, for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ.

CADY, J.

Claimant Rada Campbell is a certified nursing assistant. She was employed by Kimberly Quality Care (Kimberly) on February 5, 1990, when she received an injury which arose out of and in the course of her employment. Kimberly was a labor broker. Campbell was free to pick and choose the assignments and hours to work. She could turn down work offered to her. In the thirteen weeks before her injury, Campbell worked an average of 33.5 hours per week for Kimberly. She worked as few as sixteen hours and as many as 47.75 hours in one week.

At the time she was injured, Campbell was also employed by Medical Personnel Pool, another labor broker. Campbell worked an average of 33.6 hours per week for Medical Personnel in the thirteen weeks before her injury. Campbell had been employed by a third labor broker, Nurse Force Inc., from February 4, 1988, to May 28, 1989.

Campbell filed a claim for workers' compensation benefits. She claimed she was a part-time employee of Kimberly, and her benefits should be calculated under Iowa Code section 85.36(10) (1989). This section provides:

If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

Id.

At the administrative hearing, Jane Phillips, a representative of Kimberly, testified Campbell was offered all the hours she wanted and she picked the shifts she wanted to work. Phillips testified she considered Campbell a full-time employee. Kimberly gave a paid vacation to employees who worked at least thirty hours per week over a six-month period. Health insurance was available to employees working thirty-two hours or more per week.

The deputy Industrial Commissioner determined Campbell was a part-time employee for Kimberly. The deputy found Campbell chose to work only part of the year and she was free to pick and choose assignments by the employer. The deputy concluded Campbell's benefits should be calculated under section 85.36(10).

The employer appealed to the Industrial Commissioner. The commissioner affirmed the deputy and adopted the deputy's decision with some additional analysis. The commissioner found Campbell's line of industry was in medical pools providing certified nursing assistants. The commissioner also found Kimberly failed to show what an employee who was regularly employed by a medical pool would earn if he or she was working full-time.

The employer filed a petition for judicial review. The district court affirmed the commissioner, finding there was substantial evidence to support the commissioner's findings. The court noted the question was not whether Kimberly considered Campbell a full-time employee, but

whether she earned less than the usual weekly earnings of the regular full-time laborer in the industry of medical pools providing certified nursing assistants.

The employer appealed.

The scope of review in cases arising out of the Iowa Administrative Procedures Act is limited to the corrections of errors of law. Gilliam v. Atlantic Bottling Co., 453 N.W.2d 230, 231 (Iowa App. 1990). We review to determine whether the agency decision is supported by substantial evidence when viewing the record as a whole. Lithcote Co. v. Ballenger, 471 N.W.2d 64, 66 (Iowa App. 1991). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach the given conclusion. Id. The question is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. Gilliam, 453 N.W.2d at 232.

We find there is substantial evidence in the record to show Campbell earned less than the usual weekly earnings of the regular full-time laborer in the industry of medical pools providing certified nursing assistants. The employer admitted Campbell could have worked more hours, but she chose not to accept the work. This shows Campbell was not working the full load of hours available from her employer and she was not earning as much as an employee working the full hours available. There was also evidence that there were other Kimberly employees who worked more hours than Campbell.

An employee working less than full-time generally earns less than a regular full-time adult laborer in the line of industry in which the employee is injured. King v. City of Mt. Pleasant, 474 N.W.2d 564, 567 (Iowa 1991). The supreme court has stated section 85.36(10) applies to all cases in which a claimant is a prototypical part-time employee. Id. In Stines v. Farmers Lumber & Supply Co., 251 Iowa 320, 321, 100 N.W.2d 415, 415 (1960), an employee had forty hours per week available to him from the employer, but chose to work only twenty hours per week. The court calculated the employee's workers' compensation benefits under an earlier version of section 85.36(10). Id. at 322, 100 N.W.2d at 416.

We conclude Campbell's workers' compensation benefits should be determined under section 85.36(10). We affirm the decisions of the district court and the Industrial Commission. Costs of this appeal are assessed to Kimberly Quality Care.

AFFIRMED.