



IN THE COURT OF APPEALS OF IOWA

FOODS, INC., and MARYLAND)
CASUALTY COMPANY,)

Petitioners-Appellants,)

Filed October 22, 1986

vs.)

337

RUTH A. HEWITT,)

6-265
85-1773

Respondent-Appellee.)

Appeal from the Iowa District Court for Polk County (No. AA 665) - A. M.
Critelli, Judge.

Petitioners appeal from the district court's affirmance of the industrial commissioner's determination that respondent has a twenty-two percent industrial disability as a result of her work-related injury. **AFFIRMED.**

W. C. Hoffmann of Jones, Hoffmann & Davison, Des Moines, for
petitioners-appellants.

Fredd J. Haas of Humphrey & Haas, Des Moines, for respondent-appellee.

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

DONIELSON, P.J.

The petitioners appeal from the district court's affirmance of the industrial commissioner's determination that the respondent suffered a twenty-two percent industrial disability as a result of her work-related injury. The petitioners on appeal contend that the finding of a causal relationship between respondent's work-related injury and her present disability is not supported by substantial evidence. Petitioners additionally contend that the finding of twenty-two percent industrial disability is not supported by substantial evidence. We affirm.

The respondent, Ruth Hewitt, worked as a clerk and cashier for Dahl's supermarket, owned by petitioner Foods, Inc. On December 2, 1981, she was injured when a customer slammed a grocery cart into her. Mrs. Hewitt was initially treated by her personal physician, who subsequently referred her to Dr. David McClain, an orthopedic surgeon in Des Moines. Dr. McClain's treatment, however, did not appear to improve her condition.

Mrs. Hewitt returned to work at Dahl's in February of 1982 and worked until March 1, 1982. Mrs. Hewitt worked approximately fifty hours during that period of time, but she was unable to continue with her work, complaining of recurring pain in her back and numbness in her legs, and was placed on permanent partial disability benefits. Shortly thereafter, Foods, Inc.'s insurance carrier retained Crawford & Company, a vocational rehabilitation service, to monitor Mrs. Hewitt's medical condition and conduct a series of tests on Mrs. Hewitt to determine her chances of rehabilitation. Mrs. Hewitt performed exceptionally well on those tests, and Crawford determined that she had transferable skills which could lead to finding alternate satisfactory employment.

Crawford & Company set up an independent evaluation of Mrs. Hewitt's condition by Dr. Thomas Carlstrom. In his report dated June 7, 1982, Dr. Carlstrom found moderate paravertebral muscle spasms and myofacial strain

to Mrs. Hewitt's lower back. Dr. Carlstrom then arranged for Mrs. Hewitt to attend physical therapy sessions at Iowa Methodist Medical Center. Three weeks later, Dr. Carlstrom again examined Mrs. Hewitt and found that she had greater mobility of her legs and no muscle spasms. He did not, however, authorize Mrs. Hewitt to return to work.

Dr. Carlstrom again examined Mrs. Hewitt on August 3, 1982. At that time, Dr. Carlstrom noted that there was a decreased range of mobility in Mrs. Hewitt's lower back and at that time diagnosed a two to three percent permanent disability as a result of her work-related injury. Dr. Carlstrom also reported that Mrs. Hewitt should not lift anything greater than fifteen to twenty pounds and should not be subject to prolonged periods of sitting, standing, or bending.

During this period of time, Mrs. Hewitt was examined by Dr. McClain, Dr. McClain found that Mrs. Hewitt continued to demonstrate numbness in her lower left extremities and that her achilles reflex had decreased. Subsequent examinations by Dr. McClain revealed no changes in Mrs. Hewitt's condition. Dr. McClain encouraged Mrs. Hewitt to seek job training.

Mrs. Hewitt continued to experience problems with her back and legs in late 1982 and early 1983. In February of 1983, Mrs. Hewitt returned to Dahl's to attempt work on a job hardening basis. She was unable to perform the work and returned to Dr. Carlstrom. In March of 1983, Dr. Carlstrom stated that Mrs. Hewitt should remain off work indefinitely. Dr. Carlstrom subsequently ordered a CAT scan, which revealed that Mrs. Hewitt suffered a herniated disc. In May of 1983, Dr. Carlstrom reported that Mrs. Hewitt could return to work if her symptoms improved significantly, but expressed pessimism as to that conclusion. At that time, Dr. Carlstrom stated that Mrs. Hewitt suffered a five to seven percent permanent partial disability. On August 30, 1983, Dr.

Carlstrom examined Mrs. Hewitt one last time and discovered no change in her condition.

At the review-reopening hearing, the deputy industrial commissioner, upon a review of the entire record, determined that Mrs. Hewitt, due to her age, marketable skills, and likelihood that her income would decrease substantially, had an industrial disability of twenty-two percent, and the industrial commissioner adopted those findings. The district court affirmed the industrial commissioner's decision.

Our review of the industrial commissioner's decision is governed by Iowa Code section 17A.19. Doerfer Division of CCA v. Nicol, 359 N.W.2d 428, 432 (Iowa 1984). Our scope of review under this section is not de novo. Armstrong v. State of Iowa Buildings and Grounds, 382 N.W.2d 161, 165 (Iowa 1986). The commissioner's findings have the effect of a jury verdict. Id. Beier Glass Co. v. Burndige, 329 N.W.2d 280, 282 (Iowa 1983). Those findings are applied broadly and liberally to uphold rather than defeat the commissioner's decision, and such findings are binding on appeal unless the contrary is demanded as a matter of law. Briar Cliff College v. Campolo, 360 N.W.2d 91, 93 (Iowa 1984). We review the district court's appeal decision for errors of law and reapply the section 17A.19(8) standards to the agency action to determine whether our conclusions are the same as those of the district court. Nicol, 359 N.W.2d at 432.

Iowa Code chapter 85 (1985) governs the process through which an employee is awarded compensation for occupational injuries. Disability from injuries covered by chapter 85 have been defined as "industrial disability" or a reduction in earning capacity. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). Because industrial disability measures the loss of earning capacity rather than mere physical impairment, it was necessary for the commissioner to consider Mrs. Hewitt's functional impairment, her age, education, work experience, and

adaptability to retraining, to the extent that any of these affect her prospects for relocation on the job market. Klein, 384 N.W.2d at 374. Upon a consideration of all these factors and all the testimony bearing on these elements, the commissioner must determine the credibility of this evidence and determine the degree of industrial disability. Id.

The petitioners first contend that the finding of a causal relationship between Mrs. Hewitt's injury and her present disability is not supported by substantial evidence. We disagree.

Mrs. Hewitt has the burden of proving by a preponderance of the evidence that the injury she received on December 2, 1981, is causally related to the disability on which she now bases her claim. Holmes v. Buice Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974). A possibility is insufficient; a probability is necessary. Id. The incident need not be the sole proximate cause if the injury is directly traceable to it. Id. Determining causal connection is essentially within the domain of expert medical testimony. McSpadden, 288 N.W.2d at 185; Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 383, 101 N.W.2d 167, 171 (1960). Such expert medical testimony, however, must be considered with all the other evidence introduced bearing on the causal connection. Anderson v. Oscar Meyer & Co., 217 N.W.2d 531, 536 (Iowa 1974). The weight to be given such evidence is for the finder of fact. Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128, 132 (1967).

We believe there is substantial evidence in the record to support the industrial commissioner's finding of a causal connection. The record reveals that Mrs. Hewitt worked full time at the store prior to December 2, 1981, and that she performed her various duties well and without difficulty. It was not until after the incident in question that Mrs. Hewitt suffered pain in her lower back and numbness in her legs and experienced difficulty in working for any length

of time. Both Dr. McClain and Dr. Carlstrom, upon examining Mrs. Hewitt, concluded that in their professional opinion based upon their independent examinations, Mrs. Hewitt had suffered a permanent partial disability as the result of injuries received on December 2, 1981. While other evidence in the record revealed that Mrs. Hewitt had been experiencing a difficult family life, that she smoked a pack and a half of cigarettes daily for thirty-five years, that she drank two or more mixed drinks daily, and that she had been seen carrying her grandson despite her doctor's weight restrictions, the industrial commissioner, weighing all the facts and circumstances surrounding the December 2, 1981, incident, concluded, and we agree, that because there was no evidence indicating other conditions arising subsequent to the injury from which Mrs. Hewitt's injuries might result, the injury sustained by Mrs. Hewitt was causally connected to the December 2, 1981, accident.

The petitioners next contend that the finding of a twenty-two percent industrial disability by the industrial commissioner is not supported by substantial evidence. The petitioners point out that Mrs. Hewitt has numerous clerical skills which could easily be transferred to alternative suitable employment without starting at minimum wage. The petitioners additionally point out that Mrs. Hewitt has not formally applied for any new employment and that she has not cooperated with or utilized any of the rehabilitative services offered her. Petitioners therefore contend that the commissioner's finding is not supported by substantial evidence. We disagree.

In the present case, the commissioner was presented with conflicting evidence concerning the extent of Mrs. Hewitt's injury and whether she could be successfully integrated back into the employment market. The record reveals that Mrs. Hewitt performed well above average on the battery of tests administered by Crawford Rehabilitation. Kathleen Benson, an employee of Crawford,

testified that based on Mrs. Hewitt's work experience in bookkeeping, ledger keeping, and credit management, Mrs. Hewitt possessed transferable skills beyond entry level wages. The record also establishes that Mrs. Hewitt has not formally applied for any job, but rather has merely inquired about several jobs. Mrs. Hewitt apparently missed numerous appointments with Crawford and missed a number of therapy sessions, although Mrs. Hewitt testified that she failed to keep those appointments due to illness. There is also evidence tending to show that Mrs. Hewitt has an extremely difficult family situation and that such difficulties may be a factor in her inability to procure alternative employment.

The commissioner, however, also was presented with evidence that Mrs. Hewitt was 55 years old and that while Mrs. Hewitt had indeed worked as a bookkeeper, cashier, and credit manager, her training and education in such fields had stopped around 1960. Both Dr. McClain and Dr. Carlstrom, in their letters to Crawford, concluded that Mrs. Hewitt's condition was permanent but stable and that, in the words of Dr. Carlstrom, "I believe Mrs. Hewitt can return to her previous employment at Dahl's, should her symptoms improve significantly...[m]ost likely she will not experience enough improvement in her symptoms to return to work. I do believe that she has basically reached maximum benefits of healing at the present time..." Though Dr. Carlstrom initially released Mrs. Hewitt to a limited return to work for "job hardening," he revoked such release when it became apparent that Mrs. Hewitt still could not adequately perform her duties due to pain. Dr. McClain opined that Mrs. Hewitt sustained a permanent partial impairment of twelve percent, and Dr. Carlstrom diagnosed a five to seven percent permanent partial impairment. Evidence was also offered tending to show that Foods, Inc. had not offered Mrs. Hewitt office work which was within her range of transferable technical skills and that even if such a position was offered within her physical restrictions,

her salary would be one-third to one-half that of her approximately \$10.00 per hour salary she received as a cashier. Finally, the record revealed that cashiers employed at Dahl's were occasionally required to lift grocery sacks weighing in excess of fifteen pounds and that up to thirty-three percent of the cashier's time was spent lifting items in excess of fifteen pounds.

The commissioner was therefore faced with a situation where Mrs. Hewitt was unable to return to work in the same or similar employment as a result of an industrial injury. It was therefore necessary for the commissioner to predict the likelihood of job relocation. While there was evidence from which the commissioner could have determined that, with proper rehabilitative therapy, Mrs. Hewitt could be assimilated into alternative employment, the commissioner determined that given Mrs. Hewitt's age, outdated education, and functional disability, her opportunities to be reemployed were limited. We agree. Although Mrs. Hewitt may possibly find employment, albeit with lesser earning potential, her training and education in such fields as accounting, credit management, and bookkeeping has not been updated since 1960. Given the incredible explosion in office technology in the past twenty years, Mrs. Hewitt would have to undergo extensive rehabilitation in the modern methods now employed in such professions. We believe that such factors substantially reduce the likelihood that Mrs. Hewitt could gain lucrative employment in any clerical position. The determination in the present case was obviously a difficult one, and we cannot say that the commissioner's assessment of a twenty-two percent industrial disability was not a permissible finding. See Klein, 384 N.W.2d at 371-72 (court upheld commissioner's determination of sixty percent industrial disability where claimant was 53 years old and had suffered an elbow injury resulting in surgery, preventing claimant from obtaining the same or similar employment, despite a physician's statement that claimant had good vocational potential); Armstrong, 382 N.W.2d

at 163-64 (court upheld a determination of ten percent industrial disability, rather than district court's finding of fifty percent, on the grounds that the district court should not have engaged in its own factfindings, and that evidence tended to show that claimant's disability was largely affected by non-job-related anxiety); Nicol, 359 N.W.2d at 430-31 (court held that evidence supported a finding of a twenty percent industrial disability despite the fact that claimant had failed to seek employment, tested well above average on rehabilitative tests, and was generally lacking in motivation). We therefore conclude that the commissioner's findings were supported by substantial evidence and that the district court did not err in failing to disturb the commissioner's decision.

AFFIRMED.