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MAR 22 1979
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STEPHEN J. WAGNER,	)	
Petitioner-Appellee,	)	
vs.	)	Filed March 22, 1979
FINLEY HOSPITAL and INSURANCE COMPANY OF NORTH AMERICA,	)	
Respondents-Appellants,	)	
and	)	
IOWA INDUSTRIAL COMMISSIONER,	)	43 2-62495
Respondent.	)	

Appeal from Dubuque District Court - L. John Degnan, Judge.

Employer appeals from district court order reversing a decision of the industrial commissioner and awarding claimant vocational rehabilitation benefits. Affirmed.

Thomas J. Logan, of Hopkins & Huebner, of Des Moines, for appellants.

Thomas W. McKay, of Reynolds, Kenline, Breitbach, McCarthy, Clemens, & McKay, of Dubuque, for appellee.

Submitted to Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Employer Finley Hospital and its insurance carrier, Insurance Company of North America, appeal the trial court's judgment reversing the industrial commissioner's denial of vocational rehabilitation benefits to claimant Steven J. Wagner. Wagner was employed as a grounds keeper at Finley Hospital when he suffered an injury on December 6, 1976 to his left hand arising out of and in the course of his employment resulting in permanent partial disability. After his medical release, Wagner returned to his job from May 2, 1977 to June 3, 1977, although he complained of pain from vibration of the lawn mower and lacked the strength to do certain tasks because of his injury. Wagner took a job as a counselor at a boy's camp in Wisconsin for the summer, and then entered a vocational training course in welding, applying for vocational rehabilitation benefits.

In the initial decision, the deputy industrial commissioner found Wagner was entitled to benefits when he was unable to return to "gainful employment" because of the disability, as provided by section 85.70, The Code 1977. Upon review by the industrial commissioner, the deputy's decision was reversed and vocational benefits were denied. The industrial commissioner concluded that Wagner could return to gainful employment as evidenced by his return to work at the same job he left at the time of his injury. Claimant then appealed to the district court, where the decision of the commissioner was reversed and the court held as a matter of law that Wagner was unable to return to gainful employment, and was entitled to section 85.70's vocational rehabilitation benefits.

Appellants contend that the district court exceeded its proper scope of review of the industrial commissioner's decision, set forth in section 17A.19(8)(f), The Code, as remedying agency action unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole. See Auxier v. Woodward State Hospital School, 266 N.W.2d 139 (Iowa 1978). Claimant contends, however, that the district court reversed the agency action since it was in violation of statutory provisions, in reliance on section 17A.19(8)(a). We agree. The district court stated in its conclusions of law that the industrial commissioner misapplied the provisions of section 85.70, The Code, in disqualifying Wagner for benefits because he returned for one month

to his former job. Determination of the meaning of the term "gainful employment" as used therein is a question of law, not fact. The court is not bound by the commissioner's determination of the issue. Musselman v. Central Telephone Co., 261 Iowa 352, 355, 154 N.W.2d 128, 130 (Iowa 1967).

We agree with the district court that an injured worker should not be disqualified for vocational rehabilitation benefits because he or she returns to a former job for a short period of time to see if duties can still be successfully carried out. Here, Wagner complained of pain and an inability to carry out all his former tasks because of his injury; he then left his job. His summer employment as a camp counselor was temporary, non-sustaining employment; the district court concluded it could not be termed gainful employment. The district court's decision that Wagner is entitled to benefits is affirmed.

AFFIRMED.