

IN THE COURT OF APPEALS OF IOWA

No. 6-414 / 95-1733

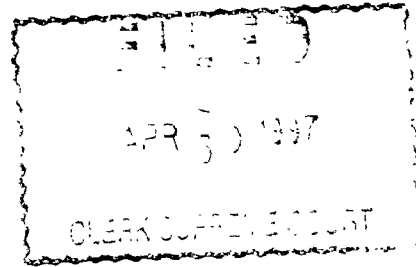
**IES UTILITIES, INC. f/k/a IOWA
SOUTHERN UTILITIES COMPANY,**
Self-Insured,

Appellant,

vs.

JINDRA K. GREEN,

Appellee.



Appeal from the Iowa District Court for Linn County, David M. Remley,
Judge.

The employer appeals the district court's decision on judicial review affirming
the industrial commissioner's award of workers' compensation benefits to respondent.

AFFIRMED.

Jeffrey K. Rosencrants, Cedar Rapids, for appellant.

Arthur C. Hedburg, Jr., of Hedburg, Ward, Owens & Vonderhaar, Des Moines,
for appellee.

Considered by Habhab, C.J., and Huitink and Streit, JJ.

PER CURIAM

Jindra Green began employment with Iowa Southern Utilities Company, now known as IES Utilities, Inc., in 1987. A physical examination taken at the time of her employment showed a slight spondylolisthesis of the spine. Green was employed as a meter reader. On January 26, 1988, Green slipped and fell during the course of her employment. She then began to have problems with her back.

In September 1989, Green transferred to the job of assistant storekeeper. This job required heavy lifting and pushing heavy appliances. Green's back problems became worse. On June 15, 1992, she left the job of assistant storekeeper because of back pain. She was transferred to the job of accounting clerk, which involved a reduction in pay.

On July 29, 1992, Green filed a claim for workers' compensation benefits. After a hearing, a deputy industrial commissioner found she had suffered a forty percent loss of her earning capacity as a result of a cumulative work injury. The industrial commissioner affirmed the deputy's decision. On judicial review, the district court affirmed the decision of the commissioner. IES now appeals.

I. We review to determine whether the agency decision is supported by substantial evidence when viewing the record as a whole. Iowa Code § 17A.19(8) (1991); *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. *Honeywell v. Allen Drilling Co.*, 506

N.W.2d 434, 435 (Iowa 1993). The question is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230, 232 (Iowa App. 1990).

II. IES contends there is not substantial evidence in the record to support the commissioner's conclusion that Green's injury date was June 15, 1992. It disputes the conclusion she suffered a cumulative injury. IES believes Green's injury date was actually January 26, 1988, when she slipped and fell. The employer argues Green's claim for workers' compensation benefits is untimely because it was not filed within two years of January 26, 1988.

The cumulative injury rule may apply when a disability develops over a period of time. *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 373 (Iowa 1985). Under this rule, an employee is disabled and injured when, because of pain or physical inability, she can no longer work. *Id.*

The commissioner determined Green suffered a gradual injury which began with her slip and fall in January 1988. We find there is substantial evidence to support the commissioner's finding Green's injury was gradual. She was able to continue to work for several years after the slip and fall. Her work aggravated her condition until, on June 15, 1992, she was compelled to leave her job because of back pain. There is substantial evidence to support the finding that under the cumulative injury rule, June 15, 1992, is her date of injury.

III. IES claims the commissioner erred in considering its accommodation of Green's disability in determining her loss of earning capacity. Green was offered the job of accounting clerk as an accommodation due to her inability to continue in the job of assistant storekeeper. This involved a reduction in pay from \$11.78 per hour to \$5.75 per hour. IES alleges that because the job change was an accommodation, it should not be considered a loss of earning capacity.

The commissioner should view loss of earning capacity in terms of the injured employee's present ability to earn in the competitive job market without regard to the accommodation furnished by the employee's present employer. *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 617 (Iowa 1995). However, an actual loss of earnings is an appropriate factor to consider when calculating industrial disability. *Oscar Mayer Food Corp. v. Tasler*, 483 N.W.2d 824, 831 (Iowa 1992). Here, the commissioner properly considered Green's actual loss of earnings as a factor in determining her loss of earning capacity.

IV. IES contends there is not substantial evidence in the record to support a conclusion Green suffered a forty percent loss of earning capacity. IES believes the award of workers' compensation benefits should be reduced because Green failed to mitigate her damages. Doctors recommended Green lose weight and engage in physical therapy. Green did not follow this advice.

Industrial disability is arrived at by determining the loss to the employee's earning capacity. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993). In

order to disturb the findings of the industrial commissioner with respect to the extent of an employee's industrial disability, a party must establish that the evidence required a different finding as a matter of law. *Klein v. Furnas Electric Co.*, 384 N.W.2d 370, 374 (Iowa 1986). Disability is determined by a consideration of age, education, qualification, experience, and inability, due to injury, to engage in the employment for which the claimant is fitted. *Doerfer Div. of CCA v. Nicol*, 359 N.W.2d 428, 438 (Iowa 1984).

We find IES has failed to show the evidence establishes a different industrial disability for Green as a matter of law. The commissioner considered Green's work restrictions, age, and education in determining her loss of earning capacity. The commissioner's finding is supported by substantial evidence.

We affirm the decision of the district court on judicial review affirming the industrial commissioner's award of workers' compensation benefits to Jindra Green. Costs of this appeal are assessed to IES.

AFFIRMED.