IN THE COURT OF APPEALS OF IOWA

No. 1999-279 (9-509) / 98-2023
Filed December 13, 1999

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CLERK SUPREME COURT

JEACO MANUFACTURING & MACHINE, Employer, and UNITED FIRE & CASUALTY COMPANY, Insurance Carrier,
Petitioners-Appellants,

vs.

JUWILLIS JEPSEN,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

Petitioner appeals from the district court ruling affirming on judicial review a decision of the industrial commissioner awarding respondent workers' compensation benefits. Petitioner contends the court erred (1) by reviewing the deputy industrial commissioner's decision, rather than the industrial commissioner's final decision; (2) by upholding the commissioner's finding that respondent's injury arose out of and in the course of employment; and (3) by upholding the commissioner's determination of industrial disability. **AFFIRMED.**

Thomas M. Plaza and Judith Ann Higgs of Heidman, Redmond, Fredregill, Patterson, Plaza & Dykstra, L.L.P., Sioux City, for appellants.

Steven J. Andreasen of Gildemeister, Willia & Keane, L.L.P., Sioux City, for appellee.

Heard by Sackett, C.J. and Zimmer and Miller, J.J.

MILLER, J.

Petitioners Jeaco Manufacturing & Machine (Jeaco) and United Fire & Casualty Company appeal the district court's judicial review decision which affirms an industrial commissioner's decision awarding worker's compensation benefits to appellee Juwillis Jepsen (Jepsen). We affirm.

Jepsen, who at the time of the accident involved in this case was a recent high school graduate, was employed by Jeaco in June of 1993. Jeaco is a welding and repair shop. On June 23, 1993 at about 4:30 p.m., a former employee, Russ Willis, who was working at Jeaco on a part-time fill-in basis, brought a 55-gallon barrel to the shop to put some holes in the bottom for drainage in order to be able to use the barrel for trash burning at his home. Jeaco's manager, David Scott, had left town that afternoon for military duty, leaving Jepsen in charge of the shop. As Jepsen was inexperienced with welding, Scott had asked Willis to stop by the shop on an "as needed" basis to complete welding jobs. Jepsen and Willis discussed various ways to put holes in the barrel. Jepsen eventually decided to use a torch, and started the job. Use of the torch caused the barrel (which had contained paint thinner) to explode, causing third degree burns to almost sixty percent of Jepsen's body. As a result of his burns, Jepsen cannot tolerate temperature extremes, has limitation in the use of his right shoulder, elbow and hand, and suffers embarrassment from severe

scarring. Jepsen sought worker's compensation benefits pursuant to Chapter 85 of the Code of Iowa.

A hearing was held on October 23, 1996 before a deputy industrial commissioner. The deputy commissioner's proposed decision ("arbitration decision"), filed April 30, 1997, would have awarded Jepsen healing period benefits, medical expenses (which amounted to over $190,000 as of the time of hearing), and permanent partial disability benefits based on industrial disability of seventy-five percent. The petitioners appealed. The industrial commissioner filed her "appeal decision" on May 22, 1998. It awarded Jepsen essentially the identical benefits that the deputy's proposed decision would have awarded. The petitioners sought judicial review in the district court. The district court concluded that the industrial commissioner's decision was supported by law and substantial evidence in the record and affirmed.

The petitioners raise four separately stated claims of error. They claim the district court erred in (1) reviewing the proposed agency decision rather than the final agency decision; (2) concluding the industrial commissioner properly applied the law in finding Jepsen's injury arose out of and in the course of employment; (3) concluding there was substantial evidence to support the decision made by the industrial commissioner; and (4) concluding the industrial commission properly assessed Jepsen's industrial disability.

Scope and Standard of Review.

Our review of a district court's ruling on judicial review of agency action is at law. *Smith-Porter v. Iowa Dept. of Human Services*, 590 N.W.2d 541, 543 (Iowa 1999). In reviewing an agency decision, the district court functions in an appellate capacity to correct legal error committed by the agency. *Wieslander v. Iowa Dept. of Transportation*, 596 N.W.2d 516, 520 (Iowa 1999). On appeal, we apply the standards of Iowa Code section 17A.19(8) to assess whether our conclusions coincide with those reached by the district court. *Id.* Ordinarily, our review is confined to whether the district court correctly applied the law. *Id.* We also review questions of statutory interpretation for errors at law. *Id.* Further, we, like the district court, are obliged to broadly and liberally construe an agency's factual findings so as to uphold, rather than defeat, the agency's decision. *Id.*

Agency findings of fact are binding on appeal unless those findings are not supported by substantial evidence. *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 354 (Iowa 1998). Evidence is substantial when a reasonable person could accept it as adequate to reach the same findings. *City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 536 (Iowa 1996). Conversely, evidence is not insubstantial merely because it would have supported contrary inferences. *Id.* Nor is evidence insubstantial because of the possibility of drawing two inconsistent conclusions from it. *Id.* The ultimate question is not whether the evidence supports a different finding but whether the evidence supports the findings actually made. *Id.*

The Merits.

For convenience, we will discuss the petitioners' claims of error in somewhat different order than they are presented.

I. Did the district err by reviewing the proposed agency decision instead of the final agency decision?

The petitioners first claim that the district court erred by actually reviewing the decision of the deputy commission instead of the final agency decision. Throughout the district court's ruling it made references to the deputy commissioner's findings, determinations, and interpretation of the law. However, it also referred at numerous places to the industrial commissioner's decision, the industrial commissioner's application of the law, the industrial commissioner's assessment of Jepsen's disabilities, the agency's decision, the agency's interpretation of the statute, the agency's findings, the factors taken into account by the agency, and the agency's reasoning. Most importantly, the district court began its discussion of the case by noting the appeal was from an Appeal Decision entered May 22, 1998 by the industrial commissioner, and began and ended its discussion of each issue or question with a reference to the agency. It stated that the first question was whether the agency properly interpreted the worker's compensation statute, and concluded that it could not find that the agency's decision was affected by errors of law or in violation of statutory provisions. Although it stated the second question to be whether there was substantial evidence to support the deputy commissioner's finding, it immediately thereafter noted that the findings of an agency must be upheld if supported by

substantial evidence in the record as a whole, and concluded that the agency's decision was so supported. It stated the final issue to be whether the agency properly assessed Jepsen's disability, stated that the agency appeared to have taken the proper factors into account, and concluded that the industrial commissioner's decision was supported by law and substantial evidence in the record.

It is "final agency action" that is subject to judicial review. Iowa Code §17A.19(1) (1999). Here the industrial commissioner issued the final agency decision. Therefore, both the district court and this court are to review the decision of the industrial commissioner.

Despite the district court's reference to the deputy commissioner's findings, determination, and interpretation, for two reasons reversible error does not appear. First, for reasons stated above, it is clear the district court was well aware that it was to review final agency action, the industrial commissioner's "Appeal Decision", and in fact did so. Second, the deputy's "Arbitration Decision" and the commissioner's "Appeal Decision" are nearly identical in findings of fact and legal conclusions, and are identical in result. Given the very minor differences between those two decisions, we are unable to see how the district court's references to the deputy's decision affected the district court's decision in any significant manner. A judgment should not be reversed and litigation prolonged unless error appears which we may reasonably suppose affected the result to the prejudice of the losing party. *Baysinger*

v. Haney, 155 N.W.2d 496, 499 (Iowa 1968). Assuming the district court erred, we find such error harmless.

II. Was there substantial evidence to support the decision made by the industrial commissioner.

The petitioners' third claim challenges those parts of the district court's decision which found that substantial evidence supported agency findings that Jepsen was involved in a scheduled work activity, Jepsen was not violating company policy, and Jepsen was furthering Jeaco's interests.

As noted by the district court, it was undisputed that Jepsen's accident occurred on the employer's premises, during normal working hours. In support of its claim that no substantial evidence shows that Jepsen was involved in a scheduled work activity, petitioners point to Jepsen's testimony that shortly before the accident he had finished a job he had been working on and had put away the tools he had been using on that job. However, this testimony has little or nothing to do with whether using a cutting torch to cut holes in a barrel was scheduled work activity, that is whether it was performing a task that would normally be part of Jepsen's prescribed duties. Evidence shows that Jeaco was a multi-purpose welding and repair shop which rarely if ever turned down jobs which involved welding or cutting metal. Evidence shows that Jepsen had used a cutting torch at Jeaco before, both with and without supervision, to do such things as cut out metal that needed replacing and cut up scrap. It was therefore reasonable to believe that using a cutting torch to cut holes in a barrel

was normal work activity and within his prescribed duties. There is substantial evidence to support the agency's determination that Jepsen was involved in scheduled work activity, that is he was performing a task that was part of his duties and was contemplated by Jeaco.

The industrial commissioner made no explicit finding Jepsen was or was not violating company policy by working on a personal project for Willis. The petitioners assert that Jepsen was violating company policy and no substantial evidence supports the industrial commissioner's implicit finding that they failed to prove that he was. However, all witnesses who were familiar with Jeaco's operations testified in some manner that working on personal projects was allowed by Jeaco. Further, there was testimony from various witnesses concerning the rules that applied to such personal projects, including paying for materials used and reimbursing Jeaco for employees' labor. There is substantial evidence to support the industrial commissioner's implicit finding that the petitioners failed to prove Jepsen was violating company policy.

The petitioners assert that the industrial commissioner's determination that Jepsen was furthering his employer's interest by doing a personal project for Willis is not supported by substantial evidence. There is evidence that Jeaco's policies required payment for materials used on employees' personal projects, and required reimbursement to Jeaco for employees' labor on such projects. Further, there is evidence that Jepsen intended to charge Willis. Willis would thus be in the position of a customer of Jeaco's, whose business furthered Jeaco's interests. Even if Willis

was not to be charged for material and labor, being allowed to have personal projects done during working hours, on Jeaco's premises, with Jeaco's tools and supplies, can reasonably be seen as an incentive for Willis to work part-time on an as needed basis for Jeaco as a welder, thus allowing Jeaco to remain open when it would otherwise be without a welder. This incentive can thus be seen as benefitting Jeaco, and thus furthering Jeaco's interests. There is substantial evidence to support the industrial commissioner's determination that Jepsen was furthering Jeaco's interests by doing a personal project for Willis.

III. Whether the district court erred in concluding the industrial commissioner properly applied the law finding Jepsen's injury arose out of and in the course of his employment.

Petitioner's second claim is that the industrial commissioner erred in concluding that Jepsen's injuries arose out of and in the course of his employment.

It is well settled in Iowa that for an injury to be compensable under the worker's compensation statute it must occur both in the course of and arise out of employment. Iowa Code § 85.3(1) (1999); *Miedema v. Dial Corporation*, 551 N.W.2d 309, 310-11 (Iowa 1996). The words "in the course of" refer to the time, place, and circumstances of the injury. *Miedema*, 551 N.W.2d at 311. The term "arising out of" refers to the cause and origin of the injury. *Id.* The two tests are separate and distinct and the claimant must satisfy both in order for an injury to be

deemed compensable. *Id.* As to the "in the course of" prong, the Iowa Supreme Court has said:

> [a]n injury [arises] in the course of the employment when it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury [arising] in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, the employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Bailey v. Batchelder, 576 N.W.2d 334, 338 (Iowa 1998) (citation omitted). In short, the "in the course of" prong demands that the proponent establish "the injury [arose] within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment." *Id.*, citing 1 Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation*, section 14.00, at 4-1 (1994).

It is undisputed that Jepsen's injury occurred during normal working hours and at Jeaco's shop where Jepsen reasonably might be in performing his duties. Substantial evidence supports the agency's determination that Jepsen was fulfilling job duties, that is performing a task within the scope of his duties which was within the contemplation of his employer, and the agency's determination that he was performing a task he deemed to be in his employer's interests. The industrial

commissioner did not err in concluding that Jepsen's injuries occurred in the course of his employment.

Injuries that occur in the course of employment or on the employer's premises do not necessarily arise out of that employment. *Miedema*, 551 N.W.2d at 311. In order for Jepsen's injury to be compensable, he must prove by a preponderance of the evidence that a causal connection exists between the conditions of his employment and his injuries. *Id.* In other words, the injury must not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of his employment. *Id.*

Jepsen was using his employer's equipment and supplies, at his employer's place of business, during normal working hours, to perform a task which substantial evidence shows was within the type of work engaged in and contemplated by his employer. His injuries were caused by his performance of that work. The industrial commissioner did not err in concluding that his injuries arose out of his employment.

IV. Whether the district court erred in concluding the industrial commissioner properly assessed Jepsen's industrial disability.

The petitioner's final claim is that the industrial commission erred in assessing Jepsen's industrial disability.

For purposes of worker's compensation law, there are two ways to evaluate a disability: functional and industrial. *Second Injury Fund v. Shank*, 516 N.W.2d 808,

813 (Iowa 1994). Functional disability is arrived at by determining the impairment of the employee's body function and is limited to the loss of the physiological capacity of the body or body party. *Shank*, 516 N.W.2d at 813. Industrial disability goes beyond body impairment and measures the extent to which the injury impairs the employee's earning capacity. *Id.* Functional disability is, however, one factor in the determination of industrial disability. *Id.* Other factors included in the determination of industrial disability are the employee's age, education, qualifications, experience, and the inability of the employee to engage in employment for which the employee is fitted. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14-16 (Iowa 1993). There are no guidelines establishing the weight to be given to each of the factors. *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 68 (Iowa App. 1991). Rather, it is necessary for the commissioner to draw upon prior experience and general and specialized knowledge to make a finding regarding the degree of industrial disability. *Id.* It is in this context that we review the evidence. *Id.*

Petitioners argue that the seventy-five percent permanent partial disability is not supported by substantial evidence. The industrial commissioner noted that Jepsen is very young, with no work experience beyond the family farm, lives in a rural community, has few transferrable skills, and has no education beyond high school. The commissioner found that his injury has limited his ability to apply for jobs requiring heavy labor, fine motor skills, or work in temperature extremes.

The petitioners do not challenge the facts relied on by the industrial commissioner to fix Jepsen's permanent industrial disability at seventy-five percent. Rather, they argue that the commissioner did not take into account those factors which, in their view, call for a lesser award. Those factors include (1) the low unemployment rate in the area (2) the variety of jobs Jepsen might hold; (3) the fact that Jepsen had not looked for work since the injury; (4) the fact Jepsen had not contacted the state vocational office or the job service; and (5) Jepsen's alleged lack of motivation for medical and vocational improvement.

The fact that the commissioner did not specifically mention or discuss at length some of these factors does not necessarily mean that the commissioner did not consider them. The low unemployment rates in the area are not of great significance. Although the petitioners set forth a lengthy list of jobs which a witness believed Jepsen could do, his range of motion limitations and his inability to work in temperature extremes make it highly unlikely that he would be able to do many of them. The commissioner did state that motivation was a factor to be considered in determining industrial disability, and noted that Jepsen had not sought vocational assistance through the area community college. Although as of August 1993, some two months after his accident, there had been difficulty getting Jepsen to cooperate with physical therapy, the evidence appears to show that as of October 1993 and thereafter his effort and performance had improved and he was working hard and making significant progress.

We find the industrial commissioner's finding of seventy-five permanent partial disability to be supported by substantial evidence. The district court did not err in affirming the industrial commissioner's decision on this point.

Affirmed.