IN THE COURT OF APPEALS OF IOWA

No. 0-121 / 99-1275
Filed April 28, 2000

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CLERK SUPREME COURT

H & W MOTOR EXPRESS,
Petitioner-Appellant,

vs.

ALBERT M. SCAGLIONE,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

H & W Motor Express (H & W) appeals from the district court's ruling on judicial review upholding the industrial commissioner's decision awarding Albert Scaglione workers' compensation benefits for two industrial disabilities. **AFFIRMED.**

Stephen W. Spencer and Joseph M. Barron of Peddicord, Wharton, Spencer & Hook, P.C., Des Moines, for appellant.

Jim Lawyer of Lawyer, Lawyer, Dutton & Drake, L.L.P., West Des Moines, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

H & W Motor Express (H & W) appeals from the district court's ruling on judicial review upholding the industrial commissioner's decision awarding Albert Scaglione workers' compensation benefits for two industrial disabilities. H & W contends (1) the court erred in making separate determinations of industrial disability for the 1991 and 1995 injuries, (2) the commissioner failed to address the issue of separate industrial disabilities in her decision, and (3) the court erred in assessing a total of seventy-two percent (72%) industrial disability. We affirm.

Scaglione began working for H & W Express in September of 1972, as a dock worker/truck driver. In 1978, Scaglione sustained a work-related injury to his elbow. After having surgery his work-related restrictions prevented him from continuing to work as a dock worker/truck driver. From 1978 through 1984, Scaglione worked as an assistant manager for his brother's pizza business. In 1984, Scaglione filed a grievance for reinstatement with the Teamsters Union after he received a release from his physician to return to work without restriction. Scaglione won his grievance and was reinstated as a dock worker/truck driver.

In February of 1991, Scaglione twisted his back while loading carpet into a truck. His employer referred him to Dr. William Boulden. Upon review of Scadlione's medical history, Boulden noted he had been diagnosed with degenerative disk disease L5-S1 in 1988, following an incident at work, but he returned to work without difficulty. Boulden referred Scaglione for physical therapy. Scaglione did not progress with physical therapy, therefore Boulden sent him for an MRI. Following the MRI, Boulden diagnosed Scaglione with

spondylolysis and spondylolisthesis L5 bilaterally with degenerative disk disease L5-S1 and recommended surgery. In September 1991, he performed a laminectomy, transverse process fusion L5-S1 with incidental dural laceration repair. A second surgery was performed to repair a tear which occurred during the first surgery. Scaglione filed a malpractice suit, and received an award of $13,000.

In April 1992, Boulden released Scaglione back to work without restriction, finding a twelve percent impairment of the body as a whole as a result of the February 27, 1991 injury. H & W paid Scaglione permanent partial disability benefits based on Boulden's rating. Scaglione returned to work.

On July 7, 1994, Scaglione reinjured his back while trying to free a dolly he was using at work. His employer referred him to Dr. Edward Steinmann for treatment. Scaglione participated in a modified work program and successfully received physical therapy. Steinmann released Scaglione to return to work on November 28, 1994, without restriction.

On October 9, 1995, Scaglione injured his back when he picked up a tire weighing approximately 600 to 700 pounds. Scaglione went to see Steinmann for diagnosis and treatment. Steinmann recommended Scaglione consider other lines of working, noting "this last injury was significant enough and as a 'final insult' to his already weakened and previously healed back." Since this injury, Scaglione has not received a release to return to work without restriction.

H & W's contract with the Teamsters Union requires all employees in Scaglione's classification to be able to perform all required job duties. Only

employees with temporary disabilities can be placed in the modified work program. H & W did not officially terminate Scaglione because he continued to be covered by the union contract for five years.

At the time of his injury in 1995, Scaglione accumulated seventeen years employment toward his pension. If he were able to secure twenty years of covered employment, his retirement benefits would have increased substantially.

On January 17, 1996, Scaglione filed three petitions for workers' compensation benefits, for injuries on February 27, 1991, July 7, 1994, and October 9, 1995. The matter proceeded to arbitration. Prior to arbitration, the parties stipulated if the 1991 and 1994 injuries were the cause of a permanent disability to Scaglione, the injuries would be evaluated as industrial disabilities.

At the time of the hearing, Scaglione was fifty-three years old. He is a high school graduate with minimal transferable skills. His previous employment involved janitorial service, detailing automobiles, and factory work. Since the date of his last injury, Scaglione has been unable to secure employment.

In addressing the extent of disability attributable to the 1991 and 1994 injuries, the deputy determined:

> [a]fter these two injuries the claimant was eventually released to return to work without restrictions and showed that he was able to perform his regular duties without substantial problems. Claimant received from Dr. Boulden, after his surgery following the 1991 injury, a functional impairment rating of 12 percent of the body as a whole which is found to be claimant's industrial disability. No rating was offered after the 1994 injury for which there was no further surgery. The deputy concludes that the claimant sustained no industrial disability as a result of the 1994 injury and claimant shall take nothing from file number 1059065. Defendant employer has paid permanent partial disability benefits equal to 12 percent and

[redacted] claimant shall take nothing further from file number [redacted]

The parties also stipulated the 1995 injury would be evaluated as an industrial disability. In addressing the 1995 injury, the deputy found Scaglione sustained a sixty percent industrial disability, noting:

> [a]t the time of the hearing claimant was 53 years old. Claimant has sustained an injury which prevents him from returning to his previous job that he has held for a number of years as a dock worker/truck driver. It should be noted that although the previous injuries have not been found to have resulted in any more than 12 percent industrial disability, those injuries, on top of the injury of October 9, 1995, have resulted in a substantial reduction of the claimant's earning capacity. Although the claimant has not been officially terminated by the employer, he is only so listed for seniority purposes pursuant to the contract that defendant employer has with the Teamsters Union, which represents employees such as the claimant. The claimant's inability to be an active employee for defendant employer does prevent him from accumulating 20 years of pension service which would result in a substantially larger monthly pension amount as opposed to what he has at this time. The claimant is making an active search for work and has shown a desire to want to work. After considering all the factors to determine industrial disability, it is the decision of the deputy that the claimant has sustained a 60 percent industrial disability as a result of the injury of October 9, 1995. Therefore, he will be entitled to 300 weeks of permanent partial disability benefits for this injury to begin on the stipulated date of September 2, 1996 and to be paid at the weekly rate of $362.82.

H & W appealed to the industrial commissioner. The commissioner upheld the deputy's decision. H & W filed a petition for judicial review. The district court upheld the commissioner, finding:

> [r]espondent should not be adversely affected merely because analysis of his prior injury was consolidated with the analysis of the more recent injury. As such, the Respondent in this case is entitled to an award of industrial disability for his permanent back injury of 1991 and also to the full benefits for his subsequent 1995 injury.

H & W appeals.

I. Standard of Review. Our review of an administrative agency decision is governed by Iowa Code chapter 17A (1995). We review a contested case proceeding for errors of law. *Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 356 (Iowa 1999). We liberally construe workers' compensation statutes in favor of coverage. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 316 (Iowa 1998).

II. Industrial Disability Determinations. H & W contends the commissioner erred in awarding Scaglione benefits for two separate industrial disabilities in a combined proceeding. An industrial disability is a measure of an employee's lost earning capacity. *Meyers*, 592 N.W.2d at 356. In determining the extent of an industrial disability, the commissioner considers the employee's age, education, experience, functional limitations and residual capacities, qualifications, and ability to maintain similar employment. *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 265-66 (Iowa 1995). Therefore, the commissioner focuses on the ability of the employee to secure gainful employment. *Meyers*, 592 N.W.2d at 356.

The commissioner analyzed Scaglione's 1991 and 1994 injuries separately from his 1995 injury. The parties stipulated if his injuries were the cause of permanent disability, the injuries would be evaluated as industrial disabilities. Following the 1991 and 1994 injuries, Scaglione was able to return to his regular duties without substantial difficulty. The commissioner noted Scaglione received a twelve percent rating to the body as a whole, which she found to be his industrial disability. Because H & W previously paid permanent partial disability benefits, the commissioner awarded Scaglione nothing further for

the 1991 injury. The commissioner declined to award benefits for the 1994 injury because Scaglione never received an impairment rating for this injury and he was able to return to work without substantial difficulty.

In analyzing the 1995 injury, the commissioner found although Scaglione was able to return to work following his previous injuries, he could not after sustaining a permanent injury in 1995. Given the stipulation of the parties, the commissioner evaluated this injury as an industrial disability.

On appeal H & W claims the two industrial disability awards are duplicative, amounting to a double recovery. The legislature does not allow apportionment in all successive work-related injuries. *Celotex Corp. v. Auten*, 541 N.W.2d 252, 256 (Iowa 1995). Apportionment is allowed for subsequent injuries if an employee is disabled and is drawing workers' compensation when the employee is injured again. Iowa Code § 85.36(10)(c). "Each subsequent injury shall be apportioned according to the proportion of disability caused by the respective injuries." *Id.* Scaglione last received workers' compensation benefits following his 1991 injury, based on Boulden's rating of twelve percent impairment to the body as a whole. Therefore, he was not drawing workers' compensation when he was injured again. In addition, an employer can receive a credit for a prior disability award where the injury results in permanent partial and total disabilities. *Id.* § 85.34(3). Following the 1991 injury, Scaglione was able to return to his regular duties without accommodation. The legislature has not provided for express apportionment under the facts of this case. We find no error

with the commissioner's decision to award benefits for two separate industrial disabilities in a combined proceeding.

III. Alleged Failure to Address Duplicative Award. H & W contends the commissioner erred by failing to address its contention the deputy erred in making separate determinations of industrial disability. The Iowa courts require the commissioner to state the evidence she relies on in reaching her conclusions. *Bridgestone/Firestone v. Accordino*, 561 N.W.2d 60, 62 (Iowa 1997). The commissioner "need not discuss *every* evidentiary fact on the basis for its acceptance or rejection so long as the commissioner's analytical process can be followed on appeal." *Id.* (emphasis in original). The commissioner's decision lists H & W's allegation as an issue to be decided. While the commissioner's ruling parallels that of the deputy, "[w]hen the commissioner's affirmance rests on review yielding identical factual findings, and the commissioner's legal analysis mirror that described by the deputy, no further recitals are necessary to satisfy section 17A.16(1) for purpose of judicial review." *Id.* The commissioner's decision rejects H & W's contention, through her discussion of how she determined Scaglione's 1991 and 1995 industrial disability awards. We find no error with her analysis.

IV. Assessment of Industrial Disability. We review the record to determine whether the agency's findings are supported by substantial evidence. *U.S. W. Communications, Inc. v. Overholser*, 566 N.W.2d 873, 875 (Iowa 1997). Evidence is substantial when a reasonable mind would accept it as adequate to reach the agency's conclusions. *Murillo v. Blackhawk Foundry*, 571 N.W.2d 16,

17 (Iowa 1997). We determine whether the evidence supports the findings actually made, not whether the evidence could support different findings. *Sherman*, 576 N.W.2d at 316. Evidence may be substantial even if it would support contrary findings. *Meyers*, 592 N.W.2d at 356. While we will broadly apply the commissioner's findings to uphold the agency decision, the decision cannot be unreasonable or involve an abuse of discretion. *Id.* An agency decision is unreasonable when the evidence supporting the action allows for no difference of opinion among reasonable minds or is not supported by substantial evidence. *Id.*

H & W contends the commissioner erred in assessing a total of seventy-two percent industrial disability. The commissioner evaluated Scaglione's injuries in 1991 and 1995 separately, according to the parties' stipulation. After carefully reviewing the record, we find the commissioner's decision is reasonable and supported by substantial evidence. Therefore, we find no error with the commissioner's findings.

AFFIRMED.