IN THE COURT OF APPEALS OF IOWA

No. 6-085 / 95-338

000237

THERESA SUZANNE PESICKA,

Petitioner-Appellee/Cross-Appellant,

vs.

SNAP-ON TOOLS CORPORATION and ROYAL INSURANCE COMPANY,

Respondents-Appellants/Cross-Appellees.

FILED
APR 23 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Kossuth County, Joseph J. Straub, Judge.

Respondent appeals from the district court's decision on judicial review remanding to the industrial commissioner his decision denying petitioner additional benefits on her workers' compensation claim. **INDUSTRIAL COMMISSIONER AFFIRMED; DISTRICT COURT REVERSED IN PART AND AFFIRMED IN PART.**

Paul C. Thune and Michael S. Roling of Peddicord, Wharton, Thune & Spencer, Des Moines, for appellant.

Mark S. Soldat, Algona, for appellee.

Heard by Sackett, P.J., and Cady and Streit, JJ.

PER CURIAM.

Respondents-appellants Snap-On Tools Corporation and Royal Insurance Company appeal from the district court's decision on judicial review remanding to the industrial commissioner his decision denying petitioner-appellee/cross-appellant Theresa Suzanne Pesicka additional benefits in her workers' compensation action. Respondents claim the district court erred in remanding the decision back to the commissioner and finding the commissioner's failure to consider petitioner's claimed back injury was not material because there was no evidence of a work-related permanent injury. Respondents further claim the commissioner properly considered and rejected petitioner's entitlement to additional temporary partial disability benefits, additional temporary total disability benefits, industrial disability benefits, and penalty benefits under Iowa Code section 86.13, and the commissioner did not err in taxing costs to petitioner.

Petitioner on cross-appeal asserts the district court erred by failing to remand the decision back to the commissioner to determine whether petitioner lost earning capacity as a result of the alleged back injury, by not interpreting certain language of Iowa Code section 85.33 for the award of temporary partial disability benefits, by determining there was substantial evidence supporting the denial of some of petitioner's claims for temporary total disability benefits, by concluding there was substantial evidence supporting the cumulative injury manifestation date determined by the commissioner, by its declaration of compensation and due dates, and by using

the fairly debatable standard for determining a penalty under Iowa Code section 86.13. We affirm.

Petitioner worked for respondent Snap-On Tools from January 1984 until she was laid off in November 1991. She originally worked as a spot welder and then as a press break operator. Both jobs required the employee to use repetitive motions of the arms, shoulder, and neck. The job as a press break operator at times required the employee to lift.

Petitioner claimed she experienced pain in her elbow and shoulder in 1984. She sought medical treatment and had surgery. She claimed to suffer pain in her lower back while working. The pain was particularly severe when she was pregnant. She missed work throughout 1987 and claimed it was the result of the pain she was experiencing.

On August 31, 1987, because petitioner reported she continued to experience discomfort in her neck, shoulder, and back, a treating physician directed she take off work and she regularly missed work. Certain of her treating physicians gave the opinion she suffered pain, but none of them were of the opinion her condition was permanent. They placed no restrictions on the work she should do.

Petitioner filed a workers' compensation claim seeking additional compensation for temporary partial disability, temporary permanent disability, industrial disability, and penalty awards pursuant to Iowa Code section 86.13, and an interest award. At an arbitration hearing, petitioner presented evidence, including

medical testimony. Petitioner's sister testified petitioner suffered a forty percent loss of the use of her body because of a work-related injury.

The industrial commissioner determined petitioner's claim was not timely, but the commissioner was reversed on this on judicial review and the matter was remanded to the commissioner.

On July 26, 1994, the industrial commissioner determined petitioner was not entitled to additional benefits for her alleged back injury because in her petition she only alleged disability of her upper extremities, neck and shoulder. The commissioner further determined there was not sufficient medical evidence to form a conclusion there was a causal relationship between petitioner's lower back problems and her employment. The commissioner concluded petitioner had not established a permanent work-related injury entitling her to industrial disability benefits. The commissioner determined the date petitioner's cumulative injury manifested itself was August 31, 1987. The commissioner determined petitioner was not entitled to additional temporary partial disability benefits because she had already been paid benefits in excess of the amount she was claiming. After reviewing petitioner's specific claims for temporary total disability benefits and determining she was only entitled to some of them, the commissioner concluded petitioner had not established she was entitled to additional total disability benefits because she had been overpaid. The commissioner also rejected petitioner's claims for interest and assessment of penalties under Iowa Code section 86.13. The commissioner also determined

petitioner's sister, as a lay witness, was not qualified to give a percentage regarding petitioner's percentage of bodily use loss. The commissioner required petitioner to pay the costs of the appeal and directed the other costs to be paid by the party incurring the cost.

Petitioner filed a petition for judicial review challenging the commissioner's decision refusing to award additional workers' compensation benefits. The district court entered a ruling remanding the decision back to the industrial commissioner. The district court determined the commissioner erred in refusing to consider petitioner's back injury claim, determining the injury was alleged in her petition. The district court noted petitioner had been off work November 10-15, 1987, and December 8-14, 1988, because of her back injury and directed the commissioner on remand to determine the amount of temporary benefits she should be paid on account of such an injury. The district court also ordered a remand for a determination by the commissioner of temporary benefits on the basis of a correct way to rate. After noting the commissioner did not address the issue, the district court directed the commissioner on remand to consider whether petitioner was entitled to temporary partial disability benefits for the periods she was under a medical overtime restriction. The district court also directed the commissioner on remand to make a specific finding to determine if petitioner was entitled to temporary total disability benefits for various dates between July 1984 through August 1989.

The district court further found the commissioner did not err in picking August 31, 1987, as the cumulative injury manifestation date. However, the court determined the commissioner failed to consider all material evidence of permanent disability and directed the commissioner to reconsider such evidence. On the basis of the court's other rulings, the commissioner was also directed to reconsider the assessment of costs and penalties but stated the commissioner was correct in adopting a fairly debatable standard for use in determining whether petitioner was entitled to penalty benefits.

Snap-On Tools appealed and petitioner cross-appealed.

We first address the issue of evidence presented by petitioner's sister which the commissioner did not consider. The trial court, relying on *Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417, 421 (Iowa 1994), found the commissioner erred in not doing so. We disagree with the trial court's interpretation of the commissioner on this issue. The commissioner said, "The issue is whether testimony from claimant's sister as a lay witness regarding claimant's percentage of bodily use lost was properly excluded." The commissioner found the petitioner's sister was not qualified to give a medical opinion and the ultimate decision as to disability is with the commissioner.

We agree with petitioner it is a fundamental requirement the commissioner consider all evidence, both medical and nonmedical, and lay witness testimony is both relevant and material upon the cause and extent of an injury. *Id.*; *see also Giere v. Aase Haugen Homes, Inc.*, 259 Iowa 1065, 1072, 146 N.W.2d 911, 915-16 (1966).

Expert medical testimony may be "buttressed by supportive lay testimony." *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 374 (Iowa 1985). Lay testimony has been considered in determining an employee's disability and functional impairment. *See Lauhoff Grain Co. v. McIntosh*, 395 N.W.2d 834, 840 (Iowa 1986). Where there is medical testimony as to the percentage of impairment, lay testimony can buttress the medical testimony and is relevant and material in determining the cause and extent of the claimant's injuries and condition. *Miller*, 525 N.W.2d at 421.

The testimony as to the percentage of bodily use was a medical opinion. Claimant's sister was not qualified to give this opinion. We agree with the commissioner the testimony of percentage of bodily use given by petitioner's sister was properly excluded.

Respondent contends the failure of the commissioner to consider petitioner's alleged back injury is not material because there is no evidence the condition was either permanent or causally related to petitioner's employment. We review to correct legal errors. *Henkel Corp. v. Iowa Civil Rights Comm'n*, 471 N.W.2d 806, 809 (Iowa 1991). The industrial commissioner's findings have the effect of a jury verdict and the reviewing court broadly applies them to uphold the commissioner's decision. *Second Injury Fund v. Hodgins*, 461 N.W.2d 454, 455 (Iowa 1990).

The commissioner found no causal relationship between petitioner's alleged low back problems and her work. There was no medical evidence establishing the condition was permanent. These findings are supported by substantial evidence.

Therefore, the commissioner's factual findings are binding on the trial court and on us *See Freeland v Employment Appeal Bd.*, 492 N.W.2d 193, 197 (Iowa 1992). We affirm the commissioner and reverse the trial court on this issue.

Respondent next contends the trial court erred in remanding for temporary disability. Respondent contends the commissioner considered and rejected petitioner's alleged entitlement to additional temporary total disability benefits. There was no finding of a causal relationship between petitioner's alleged injury and her employment. There was substantial evidence to support this finding. We affirm the trial court on this issue.

Respondent contends the trial court erred by remanding for temporary partial benefits and compensation and petitioner was not entitled to additional temporary partial disability benefits for the period when her overtime was restricted. The commissioner found petitioner's claim moot because she was overpaid. Respondent contends, even if this finding is not correct, the error is harmless because before she is entitled to overtime she must work a forty-hour week and she did not do so. We affirm the commissioner on this issue.

Respondent next contends the commissioner was correct in finding petitioner is not entitled to benefits for an industrial disability. There was substantial evidence supporting this finding. We affirm the commissioner on this issue.

Respondent next contends there is substantial evidence to support the commissioners' decision petitioner is not entitled to penalties. We agree.

We have considered the issues raised on cross appeal, whether discussed or not, and find them to be without merit.

INDUSTRIAL COMMISSIONER AFFIRMED; DISTRICT COURT REVERSED IN PART AND AFFIRMED IN PART.

Sackett, P.J., and Streit, J., concur; Cady, J., specially concurs.

CADY, J. (specially concurring)

I concur in the result.