**IN THE COURT OF APPEALS OF IOWA**

No. 1-533 / 10-2113
Filed September 21, 2011

**WESTERN PROVISIONS, INC., and**
**DAKOTA TRUCK UNDERWRITERS, and**
**RISK ADMINISTRATION SERVICES, INC.,**
Petitioners-Appellants,

**vs.**

**ARTHUR W. BETZ,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

Defendants appeal from the district court's ruling on judicial review, affirming the award of workers' compensation benefits to Western Provisions' former employee. **AFFIRMED.**

Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron & Wegman, L.L.P., West Des Moines, for appellant.

Dennis J. Mahr, Sioux City, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Mullins, JJ.

**VOGEL, P.J.**

Western Provisions, Inc. (Western Provisions) and Dakota Truck Underwriters and Risk Administration Services, Inc. (together "Defendants"), appeal from the district court's ruling on judicial review, affirming the award of workers' compensation benefits to Western Provisions' former employee, Arthur Betz. Defendants argue that the commissioner erred in (1) finding claimant to be permanently, totally disabled, and (2) awarding permanent total disability benefits under the odd-lot theory. We affirm.

## I. Background Facts and Proceedings

Arthur Betz was injured in a motor vehicle accident on March 22, 2007, while working as a truck driver for Western Provisions. The accident occurred when another vehicle merged from the shoulder and crashed directly into the semi truck Betz was driving southbound on I-35 south of Des Moines. Betz was sixty-six years old at the time of the accident.

Betz declined medical treatment at the scene of the accident, but on March 27, 2007, visited York Medical Clinic in York, Nebraska, complaining of upper and lower back pain, neck pain, and pain radiating in both the left and right legs and thighs. X-rays taken of the lumbar and cervical regions of the spine revealed no evidence of an acute fracture, and Betz was advised to take Flexeril and Motrin in addition to icing sore areas. Betz received chiropractic treatment during April 2007 and returned to work for two weeks, but pain prevented his continuing to drive trucks.

In May 2007, Betz had MRIs taken on his lumbar and cervical spine regions. The MRIs revealed "fairly advanced" degenerative changes in the

lumbar spine and "moderate" degenerative changes in the cervical spine. Betz was referred to Christopher S. Kent, M.D. in early June 2007. Upon examining Betz at his initial consultation Dr. Kent noted, "I think his symptoms are directly related to his motor vehicle accident. I am particularly concerned with his cervical spine." Dr. Kent ordered a myelogram to help better assess the compression in Betz's cervical and lumbar spine regions. Dr. Kent's review of the myelogram revealed the severity of Betz's spinal problems. In order to perform surgery on Betz's lumbar spine, and due to the severity of the compression, Dr. Kent first recommended surgery on the cervical spine. Dr. Kent performed neck surgery on Betz on July 24, 2007.

Following the neck surgery, Betz's lower back pain persisted. On November 2, 2007, Dr. Kent noted in Betz's chart, "I feel that this problem is directly related to the accident that also caused the neck injury." After ordering an MRI in November 2007, Dr. Kent reviewed the MRI and concluded Betz had "severe stenotic changes throughout his lumbar spine" and thought Betz was going to end up needing surgery. As in the past, Dr. Kent also wrote, "[p]lease note that this degeneration is directly related to the motor vehicle accident that also caused his cervical problems." Dr. Kent performed lumbar fusion back surgery on Betz on December 18, 2007. Following his lower back surgery, Betz wore a back brace, used a walker for approximately six weeks, and began walking short distances. He eventually began physical therapy and exercising at a Wellness Center in York. Six months after his lower back surgery, in June 2008, Betz reported a few aches and pains but Dr. Kent commented that overall, Betz had "markedly improved."

On May 6, 2008, Jake DeNell, PT, OCS, CWCE, performed a Functional Capacity Evaluation (FCE) of Betz, concluding Betz was able to work in the "modified medium" work category for an eight hour work day.[1] DeNell observed that Betz was subject to several restrictions due to his lumbar fusion. He noted Betz could lift and carry forty pounds on an occasional basis, push and pull up to sixty pounds on an occasional basis, and that Betz had a maximum sitting time of one-half hour to one hour at a time before he needed to get up and change positions, with a maximum sitting time of six hours per work day. DeNell also noted Betz's limited range of neck motion and extension and stated such movement should be kept to an occasional basis. Similarly, overhead reaching was recognized as an activity that should be done only on an occasional basis because of the extension required by the neck. In a letter to Dr. Kent, DeNell stated that although Betz had reached "maximum medical improvement," Betz might continue to improve in his functional capacity, and a modified Functional Capacity Evaluation might be needed in sixty to ninety days.

On May 23, 2008, David S. Diamant, M.D. performed a "Permanent Impairment Evaluation" on Betz. With respect to work restrictions, Dr. Diamant stated, "I would refer you to the functional capacity evaluation of Jake DeNell .... I would suggest following the recommendations that have been made, in the context of permanent work capacity. I see no reason to counter these. These restrictions will be permanent." In assigning a permanent impairment rating to Betz, Dr. Diamant assessed a 25% impairment of the whole person based on the

[1] DeNell's FCE classification was made according to the *Dictionary of Occupational Titles*, issued by the United States Department of Labor in 1991.

condition of his cervical spine, and a 21% impairment of the whole person based on the condition of his lumbar spine,[2] for a combined value of 41% impairment of the whole person.[3]

In June 2008, Dr. Kent felt that Betz had reached "maximum medical improvement." He also placed Betz on a permanent weight restriction of forty pounds limited to occasional lifting from both the waist to the shoulder and from the shoulder and above. These permanent weight restrictions meant Betz, who up until the day of the accident would lift up to 100 pounds in helping unload his truck, could no longer perform such work.

On January 28, 2009, Betz underwent an independent medical examination by Bruce Elkins, M.D. At the time of the examination, Betz said he did not have any significant pain, but did have pressure or a heavy feeling in his low back, especially when rising from a seated position, and occasionally he would experience brief imbalance, where his left leg would "giv[e] out." He also could not tolerate sitting for more than one and one-half hours at a time, and noticed a loss of mobility in his neck, as well as discomfort if he attempted to turn his head for more than several minutes. Dr. Elkins stated that in his opinion, the previous impairment ratings assigned to Betz were not accurate because the fifth edition of the American Medical Association's guidelines were not applied correctly. Dr. Elkins calculated Betz's impairment at 18% impairment of the

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[2] Dr. Diamant calculated the permanent impairment rating using Betz's history and physical examination, as well as medical records, and by applying the numerical figures from the fifth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*.

[3] Dr. Diamant noted that the combined impairment of the whole person is calculated by "[u]tilizing the Combined Values Chart on page 604."

whole person from the cervical region and 30% impairment of the whole person from the lumbar region. Dr. Elkins found the total combined impairment was calculated to yield a 43% whole person permanent partial impairment. In response to specific questions posed by Betz's attorney, Dr. Elkins concluded that based upon reasonable medical certainty, Betz sustained permanent injury to his lumbar and cervical spine regions as a result of a motor vehicle accident on March 22, 2007, that arose out of and in the course of his employment for Western Provisions, the two surgeries performed by Dr. Kent were necessitated by the injuries sustained in the motor vehicle accident, Betz reached "maximum medical improvement" as of June 2008, and Betz sustained a 43% permanent partial impairment of the whole person for combined lumbar and cervical injuries. Further, Dr. Elkins recommended Betz adhere to the results of the FCE administered by Jake DeNell.

Betz has no formal educational training. He graduated from high school in 1958, joined the United States Navy thereafter, received an honorable discharge in 1962, and has spent the majority of his life working as a truck driver. For two brief periods—in the early 1960s and again in 2004—Betz also worked as a heavy equipment operator. Although Betz applied for work with approximately twenty companies or farmers from the summer of 2008 up to the time of the hearing, Betz received no job offers.

Two vocational rehabilitation specialists offered their assessments of Betz's vocational options. On March 9, 2009, Michelle Holtz, hired by Defendants, prepared an employability assessment regarding Betz. At the time of the evaluation, Holtz had worked as a rehabilitation consultant and job

placement specialist for fourteen years. Holtz never met with Betz in the course of evaluating his employability. In assessing employment opportunities that would be suitable for Betz, Holtz listed twenty-seven jobs in the Waco, Nebraska labor market, all located within a fifty mile radius of Betz's home. Potential employment opportunities listed by Holtz included sales representative, telemarketer, home companion/care giver, customer service representative, front desk clerk, security officer, machine operator, retail manager/management trainee, receptionist, dispatcher, and delivery driver. Some of the skills or education required for the above jobs included: basic computer skills, typing skills, lifting not to exceed fifty pounds, ability to lift up to fifty pounds, and two years of college or technical school. Based on her research, Holtz concluded that "Mr. Betz would be considered a qualified job candidate for the positions noted above which were found to pay hourly wages in the $8.00 to $14.50 range" or approximately $320 to $580 per week based on a forty-hour work week.

On March 19, 2009, Rick Ostrander, hired by Betz, performed a vocational evaluation of Betz. At the time of the evaluation, Ostrander had worked in the capacity of a vocational counselor or rehabilitation specialist for twenty-nine years. He also worked as a vocational expert/consultant to the Social Security Administration for approximately twenty-four years and as a vocational rehabilitation counselor for the United States Veterans Administration for twenty-one years. Ostrander met with Betz in performing the vocational evaluation and also testified at Betz's initial hearing in April 2009. Ostrander's report summarized the process he used to determine appropriate jobs for Betz based on his impairment. Ostrander found "[n]o occupations relying on transferable

skills from Mr. Betz's past work history were identified consistent with his current limitations. Therefore based on skilled or semi-skilled work requiring transferable skills, Mr. Betz would have a 100% loss of employability." While unskilled, entry level work was recognized as an option for Mr. Betz, it was noted that employment in such occupations "become[s] significantly problematic for an individual of Mr. Betz's age and background who has a work disability." Further, Ostrander assessed Betz's loss in earning capacity between 80–100%, because it was questionable whether a person of Betz's age, background, and disability could maintain any type of employment.

Ostrander also reviewed the employability assessment completed by Holtz. Following his review, Ostrander wrote in a letter to Betz's attorney:

> I am not sure what Ms. Holtz's training and experience is to complete such an assessment, but my review of the assessment indicates numerous errors and a lack of understanding of the fundamental concept of transferable skills to determine employability. I believe that these mistakes lead to an erroneous conclusion.

Ostrander opined that of the twenty-seven possible employers Holtz listed for Betz, all of the positions were "inappropriate based on objective vocational indicators" including (i) Betz's functional limitations identified in medical records and the functional capacity evaluation, (ii) transferable skills, abilities, or education Betz does not have, and (iii) experience Betz does not have. Of these indicators, Ostrander believed Holtz's misunderstanding of the concept of "transferable skills" led to erroneous conclusions regarding the types of employment Betz, a sixty-eight year old disabled truck driver, could reasonably attain.

At the time of his hearing on April 29, 2009, Betz still experienced trouble sitting or standing for long periods of time—with his ability to sit limited to one and one-half to two hours—problems in the left leg and foot, including "charley horses" and his left foot going numb, a limited range of motion in his neck, and trouble sleeping due to discomfort. For exercise, Betz utilizes the Wellness Center three times a week and walks one or two miles twice a day.

On June 25, 2007, Betz filed a workers' compensation petition alleging injuries to his neck, upper and lower back, legs, and arms on March 22, 2007. In January 2008, Betz moved for a dismissal without prejudice, asserting that as a result of his second spinal surgery performed in December 2007, he would not be at maximum medical improvement at the hearing scheduled for May 28, 2008. A second workers' compensation petition was filed on June 24, 2008, also alleging injuries to Betz's neck, upper and lower back, legs, and arms. An arbitration hearing before the deputy workers' compensation commissioner found that Betz was entitled to permanent total industrial disability under Iowa Code section 85.34(3) (2007). Pursuant to the arbitration decision, Defendants were ordered to pay Betz permanent total disability benefits, commencing March 22, 2007, at a rate of $766.13 per week.

In June 2009, defendants appealed the arbitration decision, and Betz cross-appealed. The commissioner issued an appeal decision affirming the arbitration decision in March 2010. Defendants then filed a petition for judicial review. In December 2010, the district court affirmed the commissioner's decision. Defendants now appeal asserting (1) the commissioner erred in finding

claimant to be permanently totally disabled and (2) the commissioner erred in awarding permanent total disability benefits under the odd-lot doctrine.

## II. Standard of Review

Our review of agency action in workers' compensation cases is governed by the Iowa Administrative Procedure Act. Iowa Code § 17A.19 (2007); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). In reviewing decisions made by the district court, we "determine if our conclusions are the same reached by the district court." *Locate.Plus.Com, Inc. v. Iowa Dep't of Transp.*, 650 N.W.2d 609, 612 (Iowa 2002). In reviewing agency action, we are limited to correction of errors at law. *Great Rivers Med. Ctr. v. Vickers*, 753 N.W.2d 570, 573 (Iowa Ct. App. 2008). The Iowa Administrative Procedure Act directs us to reverse, modify, or grant other appropriate relief from agency action if such action is "[b]ased upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f).

## III. Permanent Total Disability Benefits

The Defendants argue the commissioner's award of permanent total disability benefits is unsupported by substantial evidence in the record. Evidence is "substantial" where the "quantity and quality . . . would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." *Id.* § 17A.19(10)(f)(1). The possibility that the court *could* draw a different conclusion from the record does not render the

evidence insubstantial. *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 133 (Iowa 2010). Our inquiry therefore turns on whether the record, when viewed as a whole, "supports the finding actually made." *Id.* at 133–34.

In the appeal decision, the commissioner affirmed and adopted the agency's arbitration decision from May 22, 2009, and supplemented the decision with an analysis of the issues properly raised on appeal, including the odd-lot doctrine. The commissioner, recognizing Betz may be suited for some part-time work, noted that Betz's

> advanced age and the need to change positions frequently severely limits the work he could realistically be hired for and perform. The record as a whole convinces that any such remaining capacity is highly limited and unlikely to enable this worker to remain self-supporting.

Furthermore, the district court in its decision stated:

> Again, the question is not whether this [c]ourt would find differently, but whether there is substantial evidence to support the findings of the [c]ommissioner. . . . A reasonable person could find that Mr. Betz's age, education and experience, in combination with his physical impairment, would reduce his earning potential by 100 percent. Thus the Commissioner's Appeal Decision is affirmed as to the industrial disability theory for permanent total disability payments.

The record contains the opinions of the two vocational experts. Ostrander opined Betz would not likely find employment while Holtz listed a number of fairly sedate employment possibilities which may be suitable for Betz. As the district court properly found, "[this] is a proverbial battle of the experts. In such a case it is not for this [c]ourt to substitute its own judgment of credibility or weight of either opinion for that of the [c]ommissioner." We agree with the district court that the

finding of permanent total disability is supported by substantial evidence,[4] and with our limited scope of appellate review, we affirm. *See IBP, Inc. v. Burress*, 779 N.W.2d 210, 213 (Iowa 2010) ("We are bound by the commissioner's findings of fact so long as those findings are supported by substantial evidence.").

**AFFIRMED.**

[4] Betz originally included his claim for disability based in part on being an "odd lot" employee. While the deputy did not make a finding addressing his assertion, Betz filed a cross appeal raising "odd lot" as a theory of recovery. The commissioner subsequently found this to be one basis for establishing Betz's entitlement to permanent disability benefits. On appeal, Defendants have raised issues concerning the commissioner's use of the odd-lot doctrine in awarding permanent total disability benefits. We note the commissioner did not solely rely on the odd-lot doctrine, but merely recognized the odd-lot doctrine as an *additional* doctrine under which entitlement to permanent disability benefits could be found. Because we conclude there is substantial evidence to support the commissioner's finding of permanent total (industrial) disability, we do not find it necessary to determine whether or not the alternative odd-lot theory applies in this case.