IN THE COURT OF APPEALS OF IOWA

No. 1-869 / 11-0655
Filed December 21, 2011

SQUARE D COMPANY, Self-Insured,
Petitioner-Appellant,

vs.

GREGORY H. PLAGMANN,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Square D Company appeals from the district court's ruling on judicial review affirming the award of workers' compensation benefits to Gregory Plagmann. **AFFIRMED.**

Sarah W. Anderson and John M. Bickel of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellant.

Robert Rush of Rush & Nicholson, P.L.C., Cedar Rapids, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Gregory Plagmann began working for Square D Company on August 18, 1969, when he was eighteen years old. He worked for Square D until he retired on December 31, 2005. Square D manufactures electrical equipment components, and parts of the facility involve high-noise levels.

During the course of his employment, Plagmann often worked overtime. His primary job duties included work in the facility's boiler room, in the molding department, in the punch press area, and as a millwright throughout the plant. Additionally, at times his job required him to make rounds through areas of the plant that were particularly noisy. Most areas where Plagmann worked had high-noise levels resulting from alarms and machinery, including metal against metal contact, air blasts, and running motors.

Plagmann testified that he was always conscientious about wearing ear plugs at work. Though Square D did not start a hearing conservation program until after Plagmann had worked there for years, he testified he wore ear plugs or an ear muff without being told to do so if he was going to spend any time at all in a high-noise area.

On April 1, 2008, Plagmann filed a petition for workers' compensation benefits for tinnitus he asserted arose out of his employment with Square D. The petition listed the injury date as December 31, 2005. Plagmann stated he first experienced a ringing in his ears in approximately 2004. Plagmann had not previously reported his tinnitus to Square D, nor did he mention it at an audiometric evaluation conducted in May 2007. Plagmann also did not check

"ringing in ears" as a symptom that applied to him on hearing questionnaires he answered in 2004 and 2005. Plagmann further reported the condition had "gotten much worse" after his retirement.

Two experts were retained to assess Plagmann's tinnitus. Plagmann retained Doctor Richard Tyler, who reviewed documents, conducted a phone interview of Plagmann, and issued a report dated February 7, 2008. Dr. Tyler considered Plagmann's noise exposure at work, noting that Plagmann "believes some measurements were made over 120 [decibels]." Dr. Tyler also noted that some chemicals have the potential to exacerbate noise-induced hearing loss and considered that Plagmann had been exposed to chemicals during his work, "including chemicals used in plating." Dr. Tyler noted, incorrectly, that Plagmann did not begin using hearing protection until 1983, about fourteen years after he began to work at Square D. Dr. Tyler opined that for years Plagmann may have been using the protection incorrectly and had needed to remove the protection at times to allow him to communicate with others. Dr. Tyler further noted that Plagmann frequently worked overtime and that it was "probable the guidelines for limiting noise-induced hearing loss are grossly inadequate for exposures of more than 40 hours in one week." Finally, Dr. Tyler stated that Plagmann had reported no other sickness or health condition that resulted in tinnitus. Based on this information, Dr. Tyler concluded the "tinnitus experienced by Mr. Plagmann was probably a result of his work at Square D." Dr. Tyler determined Plagmann's tinnitus resulted in a 4.5% whole body impairment.

Square D retained Dr. Douglas Hoisington to assess Plagmann's tinnitus. Dr. Hoisington reviewed Plagmann's medical records, his audiological history,

and dosimetry data done in the departments where Plagmann worked. He issued a report dated October 10, 2008. In this report, Dr. Hoisington discussed the decibel levels reported in different areas of the facility, as well as whether hearing protection was mandated in such areas. Dr. Hoisington noted that once exposure to noise is discontinued, there are no ongoing or latent effects that appear later. Dr. Hoisington reported there was no evidence Plagmann had been exposed to any chemicals and further noted there were no chemicals known to cause hearing loss. Dr. Hoisington reviewed Plagmann's medical issues, including hypertension and hypercholesterolemia, which he noted could cause hearing loss. Further, he noted that Plagmann had a birth defect affecting his kidneys, which he believed could indicate Plagmann also had an abnormality of the cochlea, which develops at the same time as the kidneys embryologically. Ultimately, Dr. Hoisington concluded that although Plagmann undoubtedly had hearing loss, there was "significant doubt with any reasonable degree of medical certainty that during his employment at Square D his hearing loss or tinnitus is related to work exposure noise."

At the hearing before the deputy workers' compensation commissioner, Square D offered a second report authored by Dr. Hoisington in response to his review of additional information relied upon by Dr. Tyler. Plagmann objected to the admission of this report on the grounds that it was untimely. Square D responded the report was timely because it addressed medical information from Dr. Tyler that Square D had not received until shortly before the hearing. After the deputy sustained Plagmann's objection, Square D submitted this exhibit as an offer of proof.

A review of the exhibit reveals Dr. Hoisington criticized the "very suggestive" nature of the questions on a questionnaire Dr. Tyler had asked Plagmann to complete. Dr. Hoisington also discussed for the first time in this report his finding that three of Plagmann's medications listed tinnitus as a possible side effect. Though Dr. Hoisington had previously reported that Plagmann's hypertension and hypercholesterolemia could contribute to a hearing loss, he had not previously linked Plagmann's medication with his tinnitus. Otherwise, the report did not introduce any new evidence.

On June 3, 2009, the deputy workers' compensation commissioner issued his arbitration decision. The deputy found Dr. Tyler's opinion did not satisfy Plagmann's burden of proof, due in part to Dr. Tyler's erroneous factual assumption that Plagmann had worked for fourteen years without hearing protection. Further, the deputy noted that Dr. Tyler offered no explanation for the dramatic worsening of Plagmann's condition after he retired, whereas Dr. Hoisington offered a plausible alternative theory of causation. Based on these findings, the deputy determined Plagmann's tinnitus did not arise out of and in the course of his employment at Square D.

Plagmann appealed to the Iowa workers' compensation commissioner. A deputy workers' compensation commissioner acting on behalf of the Iowa workers' compensation commissioner reversed the arbitration decision. The commissioner's decision stated a "comparison of credentials" was important in this case and found Dr. Hoisington's credentials "pale[d] in comparison to credentials and publications" of Dr. Tyler. The commissioner's decision relied heavily upon Dr. Tyler's statements that many factors negatively impact the

effectiveness of hearing protection, even when it is worn. The decision acknowledged problems with Dr. Tyler's report, including that Dr. Tyler had erroneously believed Plagmann had not worn hearing protection for fourteen years and that Dr. Tyler did not explain why Plagmann's tinnitus would worsen after leaving the high-noise environment. However, the commissioner concluded that Plagmann's consistent use of hearing protection during his employment would not affect Dr. Tyler's "views as to the lack of effectiveness of the protection." The decision further noted that although Dr. Tyler failed to explain the worsening of Plagmann's tinnitus, "[f]rom a common sense approach, it would appear that aging would always worsen hearing or tinnitus problems, but that does not mean that a significant part of the tinnitus is not work related." The commissioner ruled Plagmann had suffered a ten percent loss in earning capacity as a result of his tinnitus and ordered Square D to pay Plagmann fifty weeks of permanent partial disability at a rate stipulated to by the parties.

Square D filed a petition for judicial review. Although the district court was critical of the commissioner's appeal decision, particularly its "common sense approach," the court concluded the decision, "when viewed as a whole, is supported by substantial evidence in the record."

Square D now appeals, asserting the agency erred in: (1) concluding Plagmann's tinnitus arose out of his employment with Square D, given that Dr. Tyler's opinion was based on incorrect assumptions; (2) assigning a ten percent industrial disability rating when Plagmann voluntarily retired; and (3) excluding Dr. Hoisington's additional report as untimely.

II. Standard of Review

> Iowa Code section 17A.19(10) [2009] governs judicial review of agency decision making. We will apply the standards of section 17A.19(10) to determine whether we reach the same results as the district court. *Id.* The district court may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n).

Evercom Sys., Inc. v. Iowa Util. Bd., ___ N.W.2d ___, ___ (Iowa 2011) (internal quotation marks and citations omitted). Square D asserts the agency action meets several of the criteria listed in section 17A.19(10).

III. Factual Finding and Application of Law to Fact—Finding Tinnitus Arose out of the Course of Employment

Square D first asserts the agency's factual findings are not supported by substantial evidence. This court shall reverse or grant other appropriate relief from agency action if substantial rights of the person seeking judicial relief have been prejudiced because the agency 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." *See* Iowa Code § 17A.19(10)(f). The agency's factual determinations are clearly vested by a provision of law in the discretion of the agency. *See Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464–65 (Iowa 2004) (finding the agency is charged with the responsibility of determining an employee's right to workers' compensation benefits and must necessarily make factual findings to determine that right). We are therefore bound by the agency's findings of fact if they are supported by substantial evidence. *Id.* at 465. "Substantial evidence" is "the quantity and quality of evidence that 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." Iowa Code § 17A.19(10)(f)(1). "[T]he question before us is not whether the evidence supports different findings than those made by the commissioner, but whether the evidence supports the findings actually made." *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

Square D further asserts the agency's conclusion that Plagmann's tinnitus arose out of the course of his employment was based upon an irrational, illogical, and wholly unjustifiable application of law to fact. The application of the law to the facts is also an enterprise vested in the commissioner. *See Mycogen Seeds*, 686 N.W.2d at 465 (finding that in order to determine an employee's right to workers' compensation benefits, which is the agency's responsibility, the agency must necessarily apply the law to the facts). An agency's application of law to the facts can only be reversed if we determine such application was "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(m).

To receive workers' compensation benefits, Plagmann must show by a preponderance of the evidence that the injury arose out of and in the course of his employment with Square D. *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 652 (Iowa 2000). "An injury arises out of employment if there is a causal connection between the employment and the injury." *Id.* (internal quotation marks omitted). "Whether an injury has a direct causal connection with the employment or arose independently thereof is ordinarily established by expert testimony, and the weight to be given such an opinion is for the finder of fact." *Id.*

Relying on the medical evidence, primarily Dr. Tyler's expert opinion, the commissioner determined Plagmann's injury arose out of and in the course of his employment with Square D. Though we may have found Dr. Hoisington's evaluation to be more persuasive based on its higher level of factual accuracy, our standard of review does not permit us to substitute our opinion for that of the agency. The agency, not this court, has the authority to make factual determinations essential to the adjudication of industrial disability claims. After a careful review of the record, we conclude the agency's fact findings are supported by substantial evidence and the agency's determination that Plagmann's injury arose out of and in the course of his employment was not irrational, illogical, or wholly unjustifiable.

IV. Industrial Disability Rating

Next, Square D asserts the agency's assignment of a ten percent industrial disability rating was based upon illogical, irrational, or wholly unjustifiable reasoning. We can reverse only if we determine the agency's decision was "the product of reasoning that is so illogical as to render it wholly irrational." Iowa Code § 17A.19(10)(i).

Our workers' compensation law divides permanent partial disabilities into either scheduled or unscheduled losses. *St. Luke's Hosp.*, 604 N.W.2d at 653. Unscheduled losses, such as Plagmann's tinnitus, are compensated by determining the employee's industrial disability. *Id.* Industrial disability measures an injured worker's lost earning capacity. *Id.* In determining the extent to which Plagmann's injury reduced his earning capacity, we are to consider his age,

education, qualifications, experience, and ability to engage in similar employment. *Id.*

Square D asserts the agency erred in assigning an industrial disability rating because Plagmann's decision to end his employment with Square D was based on his decision to retire, not on his injury. Indeed, the record establishes Plagmann ended his employment with Square D to move to Florida as part of a planned retirement. He moved to Florida in November 2005, and his petition listed the injury date as December 31, 2005. The commissioner's decision acknowledged, "Clearly, the biggest impact on [Plagmann's] earning capacity was his voluntary retirement from Square D and was not shown to have been caused or precipitated by his tinnitus."

However, Plagmann and his wife testified at trial that Plagmann was looking for a job in Florida. The commissioner's decision found this persuasive, finding that Plagmann had not "withdrawn from the workplace." Noting Dr. Tyler's restrictions on the type of work Plagmann could safely perform, the commissioner's decision determined Plagmann's tinnitus had adversely affected his earning capacity.

We believe the commissioner's finding in this regard is supported by substantial evidence and is not based upon illogical, irrational, or wholly unjustifiable reasoning.

V. Excluded Exhibit

Finally, Square D asserts the deputy's decision to exclude Dr. Hoisington's second report constituted an abuse of discretion. This court shall reverse or grant other appropriate relief from agency action when that action is an abuse of

discretion. Iowa Code § 17A.19(10)(n). An abuse of discretion occurs when the agency exercises its discretion on untenable grounds or its exercise of discretion was clearly erroneous. *See IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000).

Square D asserts the deputy erred in excluding as untimely the report authored by Dr. Hoisington addressing recently received information that was relied upon by Dr. Tyler. Despite Plagmann's argument to the contrary, we find this argument was properly preserved for our review.

Dr. Hoisington's report was authored on January 28, 2009, less than two weeks before the workers' compensation hearing, which was held February 10, 2009. Plagmann objected to the admission of the report on the grounds that it was untimely. Square D asserted the report did not introduce any new evidence that had not already been admitted. Further, Square D claimed the report had been submitted late because Square D did not receive Dr. Tyler's entire file until shortly before Dr. Hoisington authored this report. The deputy sustained Plagmann's objection to the admission of the report.

Square D asserts the deputy's exclusion of expert testimony is a severe sanction that is justified only when the agency determines admission would be unfairly prejudicial to the objecting party, a finding the deputy failed to make. Square D's reliance on an unfair prejudice standard derives from an order issued by the agency. The workers' compensation commissioner issued a hearing assignment order in 2008 requiring both parties to serve a witness and exhibit list on opposing parties and to exchange all intended exhibits at least thirty days prior to hearing. The order further stated, "If evidence is offered at hearing that

was not disclosed in the time and manner required by this order . . . the evidence may be excluded if the objecting party shows that receipt of the evidence would be unfairly prejudicial."

Prehearing procedure is to be administered in accordance with orders issued by the workers' compensation commissioner. Iowa Admin. Code r. 876-4.19. If any party fails to comply with any order, the deputy "may impose sanctions which may include . . . excluding or limiting evidence . . . ." *Id.* r. 876-4.36. Thus, the deputy has discretion in imposing sanctions for failure to comply with prehearing orders. As stated by our supreme court, "[i]t is of no concern to a court reviewing an administrative sanction whether a different sanction would be more appropriate or whether a less extensive sanction would have sufficed; such matters are the province of the agency." *Marovec v. PMX Indus.*, 693 N.W.2d 779, 786 (Iowa 2005).

Although the deputy did not make a specific finding of fact concerning the possibility of unfair prejudice to Plagmann, we infer that such a finding was implicit in the deputy's decision to sustain Plagmann's objection and to exclude the exhibit. *See Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1983) ("[W]e assume as fact an unstated finding that is necessary to support the judgment against plaintiff."). Accordingly, we find the deputy did not abuse his discretion in excluding Square D's exhibit.

AFFIRMED.