IN THE COURT OF APPEALS OF IOWA

No. 8-305 / 07-0370
Filed October 1, 2008

RICHARD J. BENTHIN,
Petitioner-Appellant,

vs.

ILLOWA INVESTMENTS, INC., and
HIGHLANDS INSURANCE GROUP,
Respondents-Appellees.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Workers' compensation claimant appeals from the judicial review ruling affirming the denial of his petition to reopen/review a settlement agreement. **AFFIRMED.**

Edward Cervantes of Cervantes & Gordon, P.L.C., Davenport, for appellant.

Alexander Wonio of Hansen, McClintock & Riley, Des Moines, for appellees.

Heard by Huitink, P.J., and Vogel and Eisenhauer, JJ.

VOGEL, J.

Workers' compensation claimant Richard Benthin appeals from the judicial review ruling affirming the denial of his petition to reopen/review a settlement agreement with his former employer, Illowa Investments, Inc., and its insurance carrier, Highlands Insurance Group. We affirm.

Background Facts and Proceedings.

On July 26, 1997, Benthin was working for Illowa doing asphalt work as a seasonal laborer. While breaking asphalt with a pickax, he suffered a herniation of the lumbar region. After extended treatment, he was released to return to work in June 1998 by neurosurgeon Dr. Todd Ridenour, with restrictions of only light duty work and no lifting greater than ten pounds. Illowa accommodated the restrictions by giving Benthin work assignments of driving a pilot car and flagging, duties he could perform within the restrictions.

In April 2001, the parties entered into, and the workers' compensation commissioner approved, a settlement agreement stating Benthin was entitled to permanent partial disability payments of twenty-four percent of the body as a whole as a result of the 1997 work-related injury. At the time of the settlement, Benthin was still working the light duty jobs to accommodate his restrictions.

In July 2001, Illowa added to Benthin's work duties a job that required him to use a wand attached to an air compressor to clean cracks in the road. Benthin testified that this job entailed holding the fifteen-to-twenty pound wand while stooping over, but he was only doing this about half of the time, as he rotated between driving a truck and using the wand. In August of 2001, Benthin began experiencing increased pain and began taking narcotic pain medicine during

working hours. On May 1, 2003, Benthin filed a review reopening proceeding requesting additional industrial disability benefits. Following a hearing, the deputy workers' compensation commissioner denied the request and a second deputy, pursuant to delegation, affirmed this on appeal. On judicial review, the district court affirmed the agency's denial of Benthin's reopening request. Benthin appeals from this ruling.

Scope of Review.

Our review is governed by Iowa's Administrative Procedure Act, Iowa Code chapter 17A (2007). Accordingly, we may grant relief from the commissioner's decision if a party's substantial rights have been prejudiced and the decision 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); *see IBP, Inc. v. Harpole*, 621 N.W.2d 410, 417 (Iowa 2001). In assessing the record, we consider the record evidence that detracts from any challenged finding as well as evidence that supports it. Iowa Code § 17A.19(10)(f)(3). Moreover, "where reasonable minds may differ on the inferences to be drawn from the proven facts and circumstances, the findings of the commissioner in such matters are conclusive." *Bousfield v. Sisters of Mercy*, 249 Iowa 64, 68, 86 N.W.2d 109, 112 (1957).

Review Reopening.

Under Iowa Code section 86.14(2), the workers' compensation commissioner has authority to "reopen an award or settlement of workers' compensation benefits to inquire 'whether or not the condition of the employee warrants an . . . increase of compensation so awarded or agreed upon.'"

Gallardo v. Firestone Tire & Rubber Co., 482 N.W.2d 393, 395 (Iowa 1992) (quoting Iowa Code § 86.14(2)). When the employee files a review reopening proceeding to increase benefits, the employee must establish by a preponderance of the evidence that "he or she has suffered an impairment or lessening of earning capacity proximately caused by the original injury." *Simonson v. Snap-On Tools Corp.*, 588 N.W.2d 430, 434 (Iowa 1999).

In addition,

> the circumstances giving rise to a decrease in earning capacity must not have been within the contemplation of the decision maker at the time of the original award . . . . Thus, in a case such as this where the employee claims his earning capacity has decreased as the result of changes in his physical condition occurring after the initial award of benefits, the commissioner must determine (1) whether there has been a change in the worker's condition as a result of the original injury, and (2) whether this change was contemplated by the parties at the time of any settlement or stipulation with respect to industrial disability or whether it was beyond what the commissioner contemplated at the time of the original assessment of industrial disability.

Acuity Ins. v. Foreman, 684 N.W.2d 212, 217 (Iowa 2004).

On appeal, Benthin first maintains the agency erred in concluding that, under *U.S. West v. Overholser*, 566 N.W.2d 873, 876 (Iowa 1997), the failure to accommodate an injured worker resulting in the loss of a job does not constitute a change of condition warranting review reopening. As the *Overholser* court noted, when a settlement is reached, the injured's loss of earning capacity is properly viewed "in terms of the injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer." *Overholser*, 566 N.W.2d at 876 (citing *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 617 (Iowa 1995)). Accordingly, the disability

award must not be adjusted downward because the worker is receiving sheltered employment or merely because the employer modifies its job requirements in light of an employee's disability. *Overholser*, 566 N.W.2d at 876. Here, the agency merely cited *Overholser* in support of its overall conclusion that Benthin's condition did not change or worsen to an unanticipated extent following the settlement. Read in this context, there was no reversible error.

Benthin next claims substantial evidence does not support the agency finding that his increased need for medication during work hours was not a worsened condition unanticipated at the time of the settlement. After the initial 1997 injury Benthin was prescribed a variety of medications, including narcotic painkillers. Benthin's personal physician, Dr. Peter Laureijs, repeatedly advised Benthin not to work while taking the narcotic medications. Benthin testified that he followed this directive, taking only anti-inflammatory medication during the day, reserving the narcotic medication for after-work hours. However, during the mid to late 2001 construction season, he claimed that due to the increased pain from using the air wand he started taking narcotics at work. When Illowa discovered he was taking narcotic painkillers while working, due to safety concerns, it requested that he receive a release for using such medication from his physician. Unable to receive such authorization, Illowa did not recall Benthin to work again for the 2002 season.

The agency found that Benthin's use of narcotic medication during working hours caused Illowa management not to allow Benthin to return to work during the 2002 construction season. It further found that Dr. Laueijs's long-held view and repeated advice to Benthin that he not use narcotics while working, was

a pre-settlement condition and therefore could not have constituted an unanticipated change. We conclude substantial evidence supports this finding. The doctor's recommendations were well documented in the record and acknowledged by Benthin. Accordingly, the drug use and consequential termination from employment was not an unanticipated condition at the time of the settlement.

Finally, Benthin asserts no substantial evidence supports the agency's decision that he did not suffer any additional industrial disability. The agency did award Benthin temporary total disability benefits from April 15, 2002 through September 16, 2002, after finding Illowa failed to accommodate Benthin's light duty restrictions, which in turn lead to Benthin's increased pain and use of narcotic medicines. However, the agency also found that by September 2002, Benthin had returned to his pre-August 2001 physical condition. The agency, discounting the contrary opinion of Dr. Robert Milas, cited the opinions of three physicians, Drs. Miller, Elkin, and Deigman, who all opined that Benthin's physical condition had not worsened since the settlement. At the time of the settlement, it was clear that Benthin would continue to suffer future symptoms, that future treatment was likely, and that surgical intervention was possible. In addition, the functional capacity examinations from 1998 and 2002, although not to the exact same degree, both contain the similar essential restrictions on work activities. This constitutes substantial evidence supporting the agency's findings.

Conclusion.

Accordingly, we concur with the district court that the agency's decision was based on substantial evidence, including Benthin's medical records and the

opinions of the doctors therein, that his economic situation remained the same as it was at the time of the settlement. As the agency determined, there was no substantial or unanticipated changes in Benthin's status since the settlement date. We therefore affirm.

AFFIRMED.