

IN THE COURT OF APPEALS OF IOWA

No. 2-280 / 11-1848

Filed June 27, 2012

**COLLEGE COMMUNITY SCHOOL
DISTRICT and EMC INSURANCE
COMPANY,**

Petitioners-Appellants,

vs.

APRIL ORRIS,

Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Nancy A. Baumgartner, Judge.

College Community School District and its workers' compensation insurance carrier, EMC Insurance Company, appeal from the judicial review order remanding claimant April Orris's claim for workers' compensation benefits to the workers' compensation commissioner. **DISTRICT COURT REVERSED; COMMISSIONER'S DECISION AFFIRMED.**

Valerie A. Landis of Hopkins & Huebner, P.C., Des Moines, for appellants.

Thomas M. Wertz and Daniel J. Anderson of Wertz & Drake, Cedar Rapids, for appellee.

Heard by Vogel, P.J., and Tabor and Bower, JJ.

BOWER, J.

College Community School District and its workers' compensation insurance carrier, EMC Insurance Company, appeal from the judicial review order remanding claimant April Orris's claim for workers' compensation benefits to the workers' compensation commissioner. They contend the district court erred in determining that the agency improperly relied on anticipated future improvement in determining Orris suffered a thirty-percent permanent partial disability. Because there was sufficient evidence in the record regarding Orris's current physical condition to support the commissioner's findings, we reverse the district court and affirm the agency's decision.

I. Background Facts and Proceedings.

April Orris was employed as a middle school science teacher on May 20, 2005, when she chaperoned a field trip to a local roller skating rink. While skating, she fell and landed on her right wrist, arm, shoulder, and back. Orris was treated for her injuries at Mercy Care South where she was prescribed pain medication. Her arm was placed in a sling and she was released with restrictions of no use of her right arm.

Orris followed up with Dr. James Pape who changed her pain medication and advised her to continue to use the sling, as well as an elbow pad. Dr. Pape continued to treat Orris for the problems she experienced with her right elbow and shoulder, as well as neck pain. However, Orris reported her right elbow pain progressively increased.

Orris continued to teach during the 2005-06 school year with limited use of her right arm. In February 2006, her personal physician restricted her from lifting more than five pounds. In April 2006, Orris saw Dr. Fred Pilcher, who felt her symptoms should have resolved by that point. Since conservative treatment had not been working, he recommended surgery. On April 20, 2006, Dr. Pilcher performed an arthroscopic subacromial decompression. Orris reported the surgery increased her range of motion in her shoulder and decreased her shoulder pain, although her neck symptoms continued.

Orris resigned from her position with the College Community School District for reasons unrelated to her work injury. She continued to fulfill the duties of her position until the end of the school year. In August 2006, she began a position with the Marion Independent School District. Four days after starting, she was complaining of problems with her neck, shoulder, and elbow. Orris was suffering from anxiety, and by the following month was also suffering from depression.

Orris continued to work but her difficulties with her neck, shoulder, and elbow continued in spite of her pursuit of various avenues of treatment. In February 2007, Orris was discharged from her position with the Marion Independent School District because she had exhausted her leave options and failed to return to work. At that time, she began performing work as a tutor.

In April 2007, Orris was referred to Dr. Shahin Bagheri, a rheumatologist. After evaluating her, Dr. Bagheri noted she had symptoms consistent with

fibromyalgia, as well as depression and anxiety. In December 2007, Dr. Bagheri prescribed medication for Orris's suspected fibromyalgia.

In February 1, 2008, Dr. Charles Buck, an occupational medicine specialist, placed Orris at maximum medical improvement and released her to perform sedentary or light work for four hours per day, for six months. He released her to full duty work thereafter. Dr. Buck did not believe there was an objective basis for permanent restrictions and gave her an eight-percent permanent impairment rating based on chronic pain. He did not relate her fibromyalgia to the May 2005 work injury.

On April 8, 2008, Orris was treated by Dr. Bagheri who assessed her as being severely depressed. On April 24, Dr. March saw Orris and assessed her as being moderately to severely depressed with anxiety. He recommended Orris attend counseling. Orris discontinued counseling in June 2008 although Dr. March felt she would benefit from additional sessions.

In January 2009, Orris obtained an independent medical examination. Dr. John Kuhnlein, an occupational medicine specialist, diagnosed Orris with right radial head fracture, right shoulder impingement syndrome, chronic neck pain with radiculopathy, fibromyalgia syndrome, and significant depression and anxiety. He gave Orris an impairment rating of ten percent based on an eight-percent whole person impairment rating and a two-percent impairment rating for the loss of range of motion to her right shoulder. Dr. Kuhnlein did not feel Orris was capable of working full-time, although he felt it was possible she could work full-time in the future.

Orris filed a workers' compensation claim against College Community School District and EMC Insurance for the injuries she sustained in May 2005, including her right shoulder, neck, upper back, right arm, and mental injury. The defendants admitted her right arm and shoulder injuries arose out of and in the course of Orris's employment, but denied her claims of fibromyalgia and mental injury were casually related to the work injury. Following a hearing, the deputy workers' compensation commissioner (agency) found Orris had sustained injuries to her right elbow, right shoulder, and neck. The agency also found Orris suffered from fibromyalgia aggravated by the work injury, as well as chronic pain. While the agency found Orris's mental injury was a result of the work injury, she determined it was not permanent. The agency awarded Orris permanent partial disability benefits equal to thirty-percent industrial disability.

Orris appealed, and the workers' compensation commissioner affirmed and adopted the deputy's arbitration decision. Orris filed a motion for rehearing in which she argued the agency erroneously relied on Dr. Buck's prediction that her fibromyalgia would be under control within six months. The commissioner denied the motion, finding the arguments of Orris "were quite unconvincing as it relates to permanent total disability."

On January 10, 2011, Orris filed a petition for judicial review. The district court found the commissioner committed legal error in relying on Dr. Buck's prediction regarding her future condition when determining her industrial disability. The case was remanded to the commissioner for an evaluation of

Orris's industrial disability without consideration of her future condition. It is from this ruling that the defendants appeal.

II. Scope and Standard of Review.

We review the district court's ruling for the correction of errors at law. See *Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 390 (Iowa 2009). In doing so, we apply the standards of chapter 17A (2011) to determine whether the conclusions we reach are the same as those of the district court. *Mercy Med. Ctr. v. Healy*, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). If they are the same, we affirm; otherwise, we reverse. *Id.*

Questions of fact are decided by the workers' compensation commissioner and we only reverse the commissioner's fact findings if they are not supported by substantial evidence.¹ *Healy*, 801 N.W.2d at 870. The application of law to the facts is also within the purview of the commissioner, and we only reverse if such application is irrational, illogical, or wholly unjustifiable. *Id.*

III. Analysis.

On appeal, the defendants argue the district court erred in remanding the case to the agency to reconsider the evidence minus Dr. Buck's assessment of Orris's future condition. They argue the agency's findings, which were adopted by the commissioner, are adequately supported by the evidence as a whole.

In determining a scheduled or unscheduled award of workers' compensation benefits, the workers' compensation commissioner finds the facts

¹ 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).

“as they stand at the time of the hearing and should not speculate about the future course of the claimant’s condition.” *Kohlhaas*, 777 N.W.2d at 392. The functional impairment and disability resulting from a scheduled loss must be determined at the time of the award and not based on any anticipated deterioration of function that may or may not occur in the future. *Id.* Likewise, in cases dealing with unscheduled whole-body injuries, “the claimant’s loss of earning capacity is to be determined by the commissioner as of the time of the hearing based on the factors bearing industrial disability then prevailing—not based on what the claimant’s physical condition and economic realities might be at some future time.” *Id.* That is because any future developments, including the worsening of a physical condition or a reduction in earning capacity, are properly addressed in review-reopening proceedings. *Id.*

The sole issue on appeal is whether the agency improperly relied on evidence regarding Orris’s anticipated future improvement in finding she had suffered a thirty-percent permanent partial disability. Upon our review of the record, we find the agency did not.

The agency determined Orris is capable of full-time employment “in the sedentary to light categories” and found working as a teacher in a high school setting fit within the sedentary to light categories of labor. In making this determination, the deputy noted “Dr. Buck opined [Orris] was capable of resuming her duties as a teacher after a six month period of light duty to work.” It is on this basis that the district court found error. In its judicial review ruling, the court stated:

The Court concludes that the agency's reliance on the opinion of Dr. Buck, who had not treated Petitioner since February 2008, and who offered opinions about the future course of Petitioner's condition, was an error of law. Dr. Buck's February 2008 treatment of Petitioner was not followed up by a further, in-person meeting with Petitioner, and thus the opinions of Dr. Buck offered at the arbitration hearing were not based on the industrial disability then prevailing; rather, the opinions were based on what Petitioner's physical condition and economic realities might be at some future time. This is error under the *Kohlhaas* case.

From our review of the record, it does not appear the agency erroneously relied on Dr. Buck's opinion regarding Orris's future prospects in assigning her impairment rating. Rather, the evidence of Orris's condition at the time of the hearing supports a finding Orris was capable of teaching full-time. The agency cited other evidence in the record that supports this conclusion.

The agency cited Dr. Kuhnlein's opinion that Orris was capable of full-time employment in the light to sedentary categories with a restriction she not lift more than twenty pounds frequently and thirty pounds occasionally. Dr. Kuhnlein also stated his opinion that Orris was capable of greater physical activity than she believed she was capable of performing. This is in keeping with the physical therapist's observation that Orris was engaging in "self-limiting behavior" during her functional capacity evaluation; the physical therapist stated Orris "did not demonstrate a full and consistent effort" during the evaluation and that she "may be physically able to do more." Additionally, Dr. Kuhnlein recommended physical activity to improve Orris's fibromyalgia.

The agency acknowledged that Orris's personal physician opined she would need a position where she could change positions frequently. However, the deputy went on to find that teaching "allows one to move around the

classroom.” The deputy noted that a teacher “is able to sit, stand, and walk freely throughout the day.”

Finally, the agency noted that Dr. Bagheri never restricted Orris from working. Nor did he impose any work restrictions.

Based on the foregoing, we cannot find the agency relied on Dr. Buck’s opinion in assessing the extent of Orris’s disability. There is sufficient evidence by which the commissioner could determine Orris was capable of working in a full-time teaching position at the time of the arbitration hearing. Because the agency did not err in determining she suffered thirty-percent permanent partial disability, we reverse.

**DISTRICT COURT REVERSED; COMMISSIONER’S DECISION
AFFIRMED.**