IN THE COURT OF APPEALS OF IOWA

No. 2-691 / 12-0388
Filed October 17, 2012

ANNETT HOLDINGS,
Petitioner-Appellee/Cross-Appellant,

vs.

LACY ALLEN,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Eliza Ovrom, Judge.

An injured employee appeals the denial of temporary disability benefits and a finding of fifty percent industrial disability. Employer cross-appeals. **REVERSED IN PART, AFFIRMED IN PART.**

Pressley Henningsen and Emily Anderson of Riccolo & Semelroth, P.C., Cedar Rapids, for appellant.

Sasha L. Monthei of Scheldrup, Blades, Schrock, Smith & Aranza, P.C., Cedar Rapids, for appellee.

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

MULLINS, J.

We consider whether the workers' compensation commissioner (commissioner) erred in concluding the employer failed to offer "suitable work" pursuant to Iowa Code section 85.33(3) (2005), and whether substantial evidence supports the commissioner's finding the employee suffered a fifty percent industrial disability as a result of an on-the-job injury. The district court reversed the commissioner's ruling on the suitable work issue, but affirmed the commissioner's ruling on industrial disability. Employee, Lacy Allen, appeals and contends the offer of employment was not suitable because it was located almost 850 miles from his home, and argues that he is permanently and totally disabled. Employer, Annett Holdings, Inc. (Annett Holdings), cross-appeals asserting that Allen's industrial disability is less than 50 percent. We reverse in part and affirm in part.

I. Background Facts

Allen was thirty-eight years old at the time of the workers' compensation hearing. At all relevant times, Allen was a resident of Crystal Springs, Mississippi. Allen did not graduate from high school, but obtained his GED in 1991. Allen earned a welding certificate in 1989, but was never employed as a welder. Allen's previous work experience included working in construction, laboring on a chicken farm, and loading logs onto trucks. In 1996, Allen earned his commercial driver's license and started driving trucks for a living. He began employment as an over-the-road truck driver with TMC Transportation, Inc. (TMC) in 2005 or 2006. TMC is a subsidiary of Annett Holdings. Allen's job with

TMC required him to crank landing gear manually, drive up to eleven hours at a time, lift up to 150 pounds, and climb on and off cargo up to fourteen feet high.

As a regular part of his employment with TMC, Allen had to secure cargo on the back of flat-bed trucks. Allen described securing the truck's cargo as "throwing a chain over the load, making sure the chain [was] tight so the load [would not] shift, rolling the tarp over the lumber or steel so it [did not] get wet, [and] strapping the tarp down so the wind [did not] blow it off." On March 31, 2006, Allen attempted to secure cargo with a chain on one of TMCs flat-bed trucks. As he strained to tighten the chain, he felt a burning sensation in his neck and pain radiated down his arm.

On April 5, 2006, Allen sought medical treatment from Dr. Caswall C. Harrigan. Dr. Harrigan limited Allen to lifting twenty pounds two to six times per hour. On April 5, 2006, and again on April 10, 2006, Annett Holdings offered Allen light-duty work consistent with those restrictions. The light-duty work was in Des Moines—about 850 miles away from Allen's home in Mississippi. Annett Holdings offered to pay for Allen's transportation to and from Des Moines for home visits and doctor appointments. Annett Holdings also offered to provide hotel accommodations near the available worksite. The hotel accommodations included an exercise room, a swimming pool, and a licensed physical therapist to provide therapy on-site as needed. Allen refused both offers for light-duty work.

Dr. Larry Field, an orthopedic surgeon, assessed Allen on May 17, 2006. Dr. Field diagnosed Allen with disc protrusions at C3–4 and C4–5. In response to a letter from Annett Holdings, Dr. Field stated Allen could not return to one-

handed light-duty work because of his neck problems. On May 26, 2006, Annett Holdings suspended Allen's healing period benefits pursuant to Iowa Code section 85.33(3) because he had refused the offers of light-duty work. The first suspension of healing benefits lasted until July 26, 2006.

On July 27, 2006, Dr. Thomas Cullom performed a discectomy and a two-level cervical fusion on Allen. Dr. Cullom released Allen to light-duty work on October 3, 2006. On October 5, 11, and 13, 2006, Annett Holdings again offered Allen light-duty work in Des Moines that was consistent with his physical restrictions. Annett Holdings explained a refusal would suspend his benefits. Allen refused the offer. On October 31, 2006, Dr. Cullom upgraded Allen's work status, released him to perform medium level work, and continued to restrict Allen from sitting longer than three to seven hours. On November 1, 2006, Annett Holdings again offered Allen light-duty work in Des Moines. Allen refused.

Dr. Michael Jackson evaluated Allen on September 3, 2009. Dr. Jackson rated Allen's permanent impairment at sixteen percent and placed Allen in the light-duty work category with thirty-pound lifting restrictions and occasional forward reaching and elevated work capabilities. On the same day, therapist Amy Wenger performed a functional capacity evaluation (FCE) with Allen. The FCE report placed Allen in the light-work category. The FCE report indicated Allen put forth moderate effort and scored thirty-eight on a pain scale where a score above thirty indicates pain exaggeration.

The next day, September 4, 2009, Dr. John D. Kuhnlein evaluated Allen at Allen's request. Dr. Kuhnlein rated permanent impairment at twenty-five percent.

Dr. Kuhnlein noted, "Mr. Allen says that he has ongoing significant pain, but there are multiple non-physiologic findings on examination. . . . I cannot say that his current complaints are related to the March 31, 2006 injury within a reasonable degree of medical certainty."

On January 1, 2010, Mr. Kent A. Jayne completed a vocational economic assessment regarding Allen's ability to obtain and retain gainful employment. Mr. Jayne is a vocational assessment expert.[1] Based on Mr. Jayne's evaluation, Allen tested at or near the sixth grade level in reading, spelling, and math computation. Mr. Jayne opined,

> based upon all the medical documentation that I reviewed, the restrictions [Allen] has, his work history, training, experience, education, as well as the test results of that testing that I administered in the course of our evaluation, that he would not be competitively employable at the present time in the labor market.

In response to a March 11, 2010 letter from Annett Holdings, Dr. Cullom confirmed his October 2006 conclusion that Allen was capable of gainful employment at the medium level of employment. On March 12, 2010, Dr. Jackson reviewed Dr. Kuhnlein's report and the FCE report and amended his opinion, placing Allen in the medium level of employment.

II. Previous Proceedings

The deputy workers' compensation commissioner (deputy commissioner) held contested arbitration proceedings on March 17, 2010. The parties stipulated Allen sustained an injury arising out of and in the course of employment on March 31, 2006; the injury caused both temporary and permanent disability; Allen

[1] Mr. Jayne's previous work experience included assisting TMC in drafting its job description for over-the-road truck drivers—the position Allen held at the time of injury.

was off work from October 2, 2006, through July 27, 2007, the time claimed as healing period; the parties will use the industrial disability method commencing July 27, 2007, to compensate any permanent disability; and the proper compensation rate is $468.07 per week. The parties presented reports from the medical and vocational experts described above.

The deputy commissioner noted some of the questions Annett Holdings posed to Allen assumed facts not in evidence and unlikely to be true. Nevertheless, the deputy commissioner found Allen's testimony "was evasive and offered shifting explanations and excuses for his action. Some of his testimony was flatly unbelievable: for example, that he essentially had no idea that Dr. Cullom was repeatedly surprised that he never returned to work." The deputy commissioner further noted, "Allen cannot be viewed as a credible witness in his own behalf. He is not motivated to return to competitive employment." Allen admitted on cross-examination he had not taken any steps to contact employers, apply for jobs, or determine his eligibility for employment within his physical and vocational restrictions. With respect to Mr. Jayne's testimony, the deputy commissioner found "Jayne's opinions generally, are not clearly within his identified area of expertise and appear to encroach on other professional disciplines, especially the practice of medicine."

In an order dated June 14, 2010, the deputy commissioner found Annett Holdings's offer of light-duty work was not suitable pursuant to Iowa Code section 85.33(3). The deputy commissioner also found Allen experienced a loss of earning capacity on the order of fifty percent of the body as a whole, or the

equivalent of 250 weeks of permanent partial disability. On intra-agency appeal and cross-appeal, the commissioner affirmed the arbitration decision.

Allen sought the commissioner's decision in the district court. Allen asserted the commissioner erred in finding only fifty percent permanent partial disability. Annett Holdings filed a cross-appeal asserting the commissioner erred in finding its offer of light-duty work in Des Moines was not suitable and arguing Allen had less than fifty percent permanent partial disability.

The district court reversed the commissioner's finding on the suitable work issue under section 85.33(3) and affirmed the commissioner's finding of fifty percent permanent partial disability. Allen appeals the district court's decision. Annett Holdings cross-appeals.

III. Standard of Review

Iowa Code chapter 17A governs our review of workers' compensation commission decisions. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004). When the district court exercises its judicial review power, it acts in an appellate capacity. *Id.* Our review applies "the standards of chapter 17A to determine whether the conclusions we reach are the same as those of the district court. If they are the same, we affirm; otherwise, we reverse." *Id.* at 464.

Whether Annett Holdings offered Allen suitable work pursuant to Iowa Code section 85.33(3) is a mixed question of fact and law. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012). Whether an employer offered an injured employee suitable work is normally a question of fact. *Id.* If substantial evidence supports the commissioner's factual findings "clearly vested

by a provision of law in the discretion of the agency," we give deference to those findings. *Id.* Our review is not whether substantial "evidence supports a different finding than the finding made by the commissioner, but whether the evidence supports the findings actually made." *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). Whether the commissioner considered improper factors to support its factual determination of suitable work is a question of law. *Neal*, 814 N.W.2d at 518. We will not reverse the commissioner's application of law to the facts unless it is "irrational, illogical, or wholly unjustifiable." *Id.* Our state legislature has not vested the workers' compensation commission with the discretionary authority to interpret the term "suitable work" under section 85.33(3). *Id.* at 519. As a result, our review gives no deference to the commissioner's interpretation of the term and readily substitutes our own judgment if, and to the extent, we conclude the commissioner made an error of law. *Id.*

Our judicial review of the district court's decision to uphold the commissioner's finding of fifty percent permanent partial disability is also a mixed question of fact and law. *Neal*, 814 N.W.2d at 525. In our review of whether substantial evidence supports an agency's factual findings, we engage in a "fairly intensive review of the record to ensure that the fact finding is itself reasonable." *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003). Our review considers both supporting and detracting evidence from the record as a whole. Iowa Code § 17A.19(10)(f)(3) (2011); *Dawson v. Iowa Bd. of Med. Exam'rs*, 654 N.W.2d 514, 518 (Iowa 2002). Our review "do[es] not, however, engage in a scrutinizing analysis, 'for if we trench in the lightest degree upon the

prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality.'" *Neal*, 814 N.W.2d at 525 (citation omitted). We will not find insubstantial evidence merely because the record supports a contrary inference. *Missman v. Iowa Dep't of Transp.*, 653 N.W.2d 363, 367 (Iowa 2002).

IV. Analysis

A. Suitable Work

If an employer offers "suitable work" to an injured employee, the employee must accept the work or waive the right to partial, temporary total, and healing period benefits. Iowa Code § 85.33(3); *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 559 (Iowa 2010). If an employer fails to offer suitable work, Iowa Code section 85.33(3) will not disqualify the employee from receiving benefits. *Schutjer*, 780 N.W.2d at 559. To determine whether an employer offered suitable work, "the commissioner may consider the distance of available work from the claimant's home." *Neal*, 814 N.W.2d at 524.

Annett Holdings offered Allen light-duty work. Allen refused the offer. Thus, we review the commissioner's decision to determine whether Annett Holdings offered Allen suitable work pursuant to section 85.33(3).

Our supreme court interpreted the suitable work requirement in a recent case involving Annett Holdings and its subsidiary TMC. *Id.* at 519–25. In *Neal*, the court considered whether the commissioner erred in concluding "that light-duty employment offered to an injured worker was not 'suitable work' under Iowa Code section 85.33(3) because the offered employment was located 387 miles

from the residence of the worker." *Id.* at 516. TMC offered an injured over-the-road flat bed truck driver light-duty work in Des Moines. *Id.* at 525. TMC offered the claimant hotel accommodations while the claimant worked in Des Moines. *Id.* TMC also offered the claimant transportation to allow the claimant to return home every other weekend. *Id.* Prior to the injury, the claimant was able to return home every weekend. *Neal*, 814 N.W.2d at 525. The court held that substantial evidence supported the commissioner's finding that the long distance between the offered work and claimant's home rendered the work not sufficiently suitable to disqualify claimant from benefits.

Here, TMC offered Allen accommodations similar to those TMC offered the claimant in *Neal*. *Id.* The employment TMC offered Allen was in Des Moines and was approximately 850 miles away from Allen's residence in Crystal Spring, Mississippi—more than twice the distance TMC offered the claimant in *Neal*. *Id.* We find the distance between the available work in Des Moines and Allen's residence in Mississippi unreasonable given Allen's two-level cervical fusion, restrictions on the amount of time he can sit, and other physical limitations. We find substantial evidence supports the commissioner's finding TMC failed to offer Allen suitable work pursuant to section 85.33(3). Accordingly, we reverse the district court's decision on the suitable work issue.

B. Permanent Partial Disability Benefits

An injured employee who suffers a "permanent disability" is entitled to compensation. *See* Iowa Code § 85.34. Compensation for permanent partial disability from an unscheduled injury is based on the injured employee's earning

capacity. *Broadlawns Med. Ctr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010). To determine earning capacity, we consider a number of factors, including "functional disability . . . age, education, qualifications, experience, and inability to engage in similar employment." *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 137–38 (Iowa 2010). We also consider personal characteristics affecting the employee's employability. *Ehlinger v. State*, 237 N.W.2d 784, 792 (Iowa 1976). On review we focus on the injured worker's ability to obtain gainful employment, not merely on the worker's physical disability. *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 264 (Iowa 1995).

Allen contends his industrial disability is one hundred percent. Annett Holdings contends Allen's industrial disability is zero percent. The commissioner's fifty percent industrial disability determination based on the application of law to the facts of this case will be upheld on review unless it is "irrational, illogical, or wholly unjustifiable." *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007).

Allen suffered from a work-related injury requiring a discectomy and a two-level cervical fusion. He is thirty-eight years old, has a GED with no post-high school education, and has worked manual labor jobs his entire adult life. He tested somewhere at or near the sixth grade level in reading, spelling, and math computation. Allen's vocational expert, Mr. Jayne, analyzed Allen's vocational opportunities given his age, education, experience, physical limitations, and local employment opportunities. Mr. Jayne opined Allen's personal characteristics

would not allow him to qualify for an over-the-road trucking position and would preclude competitive work and training in other fields.

The medical reports presented in this case note Allen's lack of motivation to return to work and lack of effort in functional evaluations. Each opinion, however, indicated some level of permanent disability and placed some restrictions on his work level. Dr. Collum, Dr. Jackson, and Dr. Kuhnlein assigned Allen impairment ratings of fifteen, sixteen, and twenty-five percent, respectively.

We consider Allen's physical limitations in conjunction with his ability to obtain gainful employment. We find substantial evidence supports the commissioner's finding of partial industrial disability. *Missman*, 653 N.W.2d at 367 (stating evidence is not insubstantial merely because the record supports an inference contrary to the commissioner's findings). Reviewing the record as a whole, including Allen's physical disabilities and vocational limitations, we cannot say the commissioner's finding of fifty percent permanent disability was irrational, illogical, or wholly unjustifiable. *Neal*, 814 N.W.2d at 518.

In the alternative, Allen argues he is an odd-lot employee entitled to permanent total disability. The odd-lot doctrine is an alternative theory of recovery implicit in the industrial disability standard. *Michael Eberhart Constr. v. Curtin*, 674 N.W.2d 123, 126 (Iowa 2004); *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 104–05 (Iowa 1985). When an injury makes the worker incapable of obtaining employment in any well-known sector of the labor market, an injured

employee is an odd-lot employee entitled to permanent total disability. *Michael Eberhart Constr.*, 674 N.W.2d at 125.

Under the odd-lot doctrine, the injured employee carries the burden of production to demonstrate his inability to obtain gainful employment. *Guyton*, 373 N.W.2d at 105. Once a claimant makes a prima facie case of odd-lot status, the burden of proof shifts to the employer to show evidence of the existence of reasonable, steady employment. *Michael Eberhart Constr.*, 674 N.W.2d at 125–26.

To determine whether the injured employee established a prima facie case of odd-lot status, it is "normally incumbent on the claimant to demonstrate a reasonable effort to secure employment." *Nelson*, 544 N.W.2d 258, 267 (Iowa 1996) (internal quotations omitted) ("Clearly, in the typical case the employee will want to demonstrate a good faith, unsuccessful effort to find steady employment."). Proof of reasonable efforts to secure employment is not, however, an absolute prerequisite for odd-lot status. *Id.* The claimant need not show proof of reasonable efforts to obtain employment if the claimant presents "*substantial* evidence that he has no reasonable prospect of steady employment." *Id.* In other words, in order to avoid the reasonable efforts requirement, the claimant must show that any effort to search for a new job would be futile. *Id.* at 267–68. It is within the agency's province to determine the weight and credibility of expert testimony. *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). Despite the practical effect of the

burden shifting rule, "the ultimate burden of persuasion on the issue of industrial disability always remains on the employee." *Nelson*, 544 N.W.2d at 267.

On cross-examination, Allen agreed he had not taken any steps to contact employers to determine his eligibility for employment within his physical and vocational restrictions. At issue is whether Allen presented substantial evidence of no reasonable prospect of steady employment, rendering the search for a job futile.

Allen argues Mr. Jayne's expert vocational opinion is sufficient to demonstrate the futility of any job search and lack of competitive employment opportunity in the labor market. Mr. Jayne opined,

> based upon all the medical documentation that I reviewed, the restrictions [Allen] has, his work history, training, experience, education, as well as the test results of that testing that I administered in the course of our evaluation, that he would not be competitively employable at the present time in the labor market.

In *Nelson*, the claimant did not demonstrate reasonable efforts to obtain employment. *Id.* at 267–68. Nevertheless, the court found the claimant had "established a prima facie case that he is an odd-lot employee through the consistent testimony of the medical and vocational experts that he cannot work in the competitive job market together with evidence of his age, his multiple physical impairments (knees, shoulder and deafness) and his lack of education and training for any employment other than manual labor." *Id.* at 268. The court then shifted the burden of proof to the employer to present evidence of available employment opportunities. *Id.*

Here, Mr. Jayne's credentials are impressive, and Allen's reliance on Mr. Jayne's professional opinion is not misguided. The commissioner's assessment of the credibility and weight of expert witnesses, however, deserves deference on appeal. *Dunlavey*, 526 N.W.2d at 853. The commissioner discounted the credibility of Mr. Jayne's report absent supportive medical evidence. Dr. Cullom, Dr. Jackson, and Dr. Kuhnlein each opined Allen was able to return to work at the medium level category. Dr. Cullom was surprised Allen had not returned to work. Dr. Kuhlein, Allen's medical expert, could not determine within a medical degree of certainty whether Allen's pain complaints were causally related to his March 31, 2006 injury because of non-physiological findings in his complaints. The FCE report indicated Allen put forth only moderate effort and rated his pain a thirty-eight on a scale where scores above thirty indicate exaggeration of pain symptoms. Further, Allen is the primary source for establishing the level of disability in this case. The commissioner found Allen was not a credible witness on his own behalf and portions of his testimony were "flatly unbelievable."

Unlike the consistent expert medical and vocational opinions in *Nelson*, the great weight of the medical evidence does not support a finding of no reasonable prospect for steady employment in this case. *Nelson*, 544 N.W.2d at 267–68. We find Allen has not met his burden of producing substantial evidence under the odd-lot doctrine, and the commissioner's application of law to fact in this respect was not irrational, illogical, or wholly unjustifiable. *Neal*, 814 N.W.2d at 518. Thus, we affirm the district court's decision to uphold the commissioner's finding of 50 percent industrial disability.

V. Conclusion

For the foregoing reasons, we find the commissioner did not err in finding Annett Holdings failed to offer Neal suitable work for purposes of Iowa Code section 85.33(3). We also find substantial evidence supports the commissioner's findings of fact with respect to the extent of Allen's industrial disability and the commissioner's application of those facts in holding Allen suffered a fifty percent industrial disability is not irrational, illogical, or wholly unjustifiable. Thus, we reverse the judgment of the district court in part and affirm in part.

REVERSED IN PART, AFFIRMED IN PART.