IN THE COURT OF APPEALS OF IOWA

No. 2-722 / 12-0240
Filed November 15, 2012

MERIVIC, INC. and ZURICH NORTH AMERICA,
Petitioners-Appellants,

vs.

ENRIQUE GUTIERREZ,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson, Judge.

An employer and its insurer appeal a workers' compensation ruling finding an employee permanently and totally disabled. **AFFIRMED.**

Mark A. Woollums and Jordan A. Kaplan of Betty, Neuman, & McMahon, P.L.C., Davenport, for appellants.

James C. Byrne of Neifert, Byrne, & Ozga, P.C., West Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

VAITHESWARAN, P.J.

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I. Background Facts and Proceedings

Forty-eight-year-old Enrique Gutierrez had a ninth-grade education and a limited working knowledge of English, despite having lived in the United States for approximately thirty-four years. His job history included work as a mechanic and manual laborer and, most recently, as a welder with Merivic, Inc.

While on the job at Merivic, Gutierrez fell from a height of ten to twelve feet and landed on a steel table, injuring his left wrist and the rotator cuff in his left shoulder. Gutierrez underwent two surgeries—one to repair his wrist and the other to repair his rotator cuff. Between surgeries, he returned to light-duty work at Merivic and, with assistance, performed one-armed welding. Following the second surgery, Gutierrez was able to work for only three hours before he was told the work did not comport with his medically-imposed restrictions. He did not work at Merivic again and was unable to find employment elsewhere.

Gutierrez petitioned for workers' compensation benefits. After an arbitration hearing, a deputy workers' compensation commissioner determined Gutierrez "suffered a 100 percent or total loss of his earning capacity as a result of the work injury." The deputy partially relied on the report of a vocational rehabilitation expert, who cited Gutierrez's limited fluency in English and the adverse effect of that factor on his employability. The deputy found this factor did indeed reduce Gutierrez's earning capacity. Conversely, the deputy rejected the employer's contention that Gutierrez's award of benefits should be reduced

based on an alleged lack of motivation to learn English. On that point, the deputy stated, "This agency . . . no longer penalizes injured workers who fail to learn the English language while working for employers in this country." The deputy cited an agency decision, *Lovic v. Construction Products, Inc.*, No. 5015390 (Iowa Workers' Comp. Comm'n, Dec. 27, 2007), for that proposition.[1]

[1] *Lovic* stated in pertinent part:

> [T]his agency has been penalizing immigrant workers for failing to learn English since 1997 by lowering awards purportedly due to their lack of motivation. The theory expressed in these decisions was that a lack of English communication skills is a disability unrelated to employment, if it is within the claimant's ability to learn English. Over the years, this policy has been applied to alleged lack of claimant's motivation to learn English both before and after the injury. *Castandada v. IBP, Inc.*, File No. 1230801 (App. Dec. May 5, 2003); *Frausto v. Louis Rich, Inc.*, File No. 1063389 (App. Dec. May 22, 1997). Unfortunately, this line of cases overlooked the fact that the employers who hired these workers should have reasonably anticipated that an injury which limits an ability to return to manual labor work would have far more devastating consequences upon non-English speaking workers than English speaking workers. Oftentimes, this agency has penalized non-English speaking workers despite the knowledge that the employers actually recruited such workers because they were willing to work for less wages.
>
> What has been troublesome to many, including myself, is that this agency has never similarly treated non-immigrant workers for failing to learn other skills. Defendants would certainly have trouble citing any agency or court precedent in the workers' compensation arena where an industrial award for an English speaking worker was lowered because the injured worker, before the injury, failed to anticipate he would suffer a devastating work injury and failed to obtain a type of education before the injury that would mitigate the effects of such an injury. There are cases in which post-injury retraining or lack of effort to obtain such, may be relevant to an industrial analysis, but only if it is shown by the party desiring its use that such retraining would be likely successful and would likely lead to a gainful employment. Without such proof, use of any retraining effort, or lack thereof, in assessing a loss of earning capacity, would be speculative, at best.
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> In this case, there was no proof offered whatsoever of the likelihood that claimant would learn fluent English from the classes that may have been available to him as reported by vocational rehabilitation consultant, Susan McBroom, M.S., or that claimant would obtain suitable work after taking these classes . . . . We simply cannot assume that claimant was capable of such training or that such classes are generally successful in leading to employment where fluent English is required . . . .

On intra-agency appeal, Merivic asked the commissioner to overrule *Lovic* and view Gutierrez's failure to learn English as a factor weighing against a finding of total disability. The commissioner declined to do so, reasoning the "defendants have not provided a compelling basis for modification of agency precedent found in *Lovic*." The commissioner affirmed the deputy's decision but added a sentence clarifying that the disability determination was primarily based on factors other than Gutierrez's lack of fluency in English.

Merivic sought judicial review of the agency decision, arguing the agency erred in refusing to overrule *Lovic*. The district court found it unnecessary to reach the issue because, in the court's view, there was "substantial evidence in the record to support the commissioner's determination" of a "permanent and total disability even *without* considering his language deficiency."

II. Analysis

On appeal, Merivic reiterates that *Lovic* was "incorrectly reasoned" and "incorrectly decided." Merivic's argument amounts to an impermissible collateral attack on an unappealed agency decision. *See Walker v. Iowa Dep't of Job Serv.*, 351 N.W.2d 802, 805 (Iowa 1984); *Toomer v. Iowa Dep't of Job Serv.*, 340 N.W.2d 594, 598 (Iowa 1983). For that reason, we decline to consider it.

In a related vein, Merivic argues *Lovic* "overturn[ed] a decade of agency precedents regarding how to assess motivation," mandating reversal under Iowa Code section 17A.19(10)(h) (2011). That provision states a court "shall reverse,

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> Claimant in this case was shown to be clearly permanently and totally disabled.

(Citations omitted.)

modify, or grant other appropriate relief from agency action," if the action "is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency." Iowa Code § 17A.19(10)(h). Again, Merivic's argument is a collateral attack on *Lovic*. Merivic essentially seeks to turn back the clock to the pre-*Lovic* era when the commissioner accepted a claimant's failure to learn English as a basis for reducing the claimant's award. That ship has sailed. Contrary to Merivic's assertion, *Lovic* was the agency precedent in effect at the time Gutierrez's case was decided, and the commissioner's decision was entirely consistent with that agency precedent. Accordingly, the judicial review standard set forth in section 17A.19(10)(h) is not implicated.[2]

The key question on judicial review is whether the commissioner's determination that Gutierrez's work-related injury "was a cause of a 100 percent loss of the earning capacity [he] possessed immediately before this injury" is supported by substantial evidence or is based on an "irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency." *Id*. § 17A.19(10)(f)(1), (m). *Compare*

[2] In any event, it appears an agency's departure from its own precedent is not a ground for reversal in an appeal from a contested case proceeding. *See Finch v*. *Schneider Specialized Carriers*, *Inc*., 700 N.W.2d 328, 332 (Iowa 2005) ("The controlling legal standards are those set out in the workers' compensation statutes and in this court's opinions, not in prior agency decisions.") *See also Keystone Nursing Care Ctr*. *v*. *Craddock*, 705 N.W.2d 299, 304 n.2 (Iowa 2005) ("[T]he commissioner's final decision is judged against the backdrop of the workers' compensation statute and the Iowa appellate cases interpreting it, not previous agency decisions."). Merivic does not assert that the commissioner's invocation of *Lovic* in this case was inconsistent with the workers' compensation statutes or with judicial precedent.

Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012) (stating issue is a mixed question of law and fact but reviewing for substantial evidence), *with Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 856–57 (Iowa 2009) (stating issue is a challenge to agency's application of law to fact and reviewing under "irrational, illogical, or wholly unjustifiable" standard).[3]

The commissioner adopted all of the deputy commissioner's findings on earning capacity but, as will be discussed, qualified the deputy's finding that Gutierrez's lack of English proficiency limited his employability. *See Neal*, 814 N.W.2d at 526 (setting forth factors for consideration in determining earning capacity); *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 852 (Iowa 2011) ("Industrial disability is determined by an evaluation of the employee's earning capacity."). The findings that the commissioner adopted in full are supported by substantial evidence in the record, and the application of law to fact is not "irrational, illogical, or wholly unjustifiable."

Specifically, a vocational expert retained by Gutierrez described him as "approaching advanced age." *See Neal*, 814 N.W.2d at 526 ("We have previously held the age of forty-seven is a factor that the commissioner may consider in finding industrial disability."). The expert also noted Gutierrez's "limited education" and limited work history involving physically demanding jobs, which his permanent work restrictions prevented him from performing. *See id.* ("The commissioner could properly consider his high school education and lack of specialized training as a factor that could lessen his earning ability."). The

[3] Merivic contends the "substantial evidence" standard was never asserted and is not a "basis for appeal." To the contrary, the employer cited that standard in its petition for judicial review.

expert next described Gutierrez's functional capacity, listing a litany of "challenges following his injury," including difficulty lifting and carrying, gripping and grasping, and reaching. She characterized these limitations as "severe," opining they would prevent Gutierrez from returning to his past work and would restrict his ability to perform other jobs identified by the employer's expert. *See id.* at 527 ("The inquiry requires a consideration of the employee's actual employability, namely, the extent to which jobs are available for which Neal can realistically compete . . . ."). She concluded, "[T]here are no positions in any quantity, quality or dependability available in his job market."

The commissioner found this expert's opinion more convincing than the opinion of the expert retained by the employer. The deputy reasoned that, unlike the employer's expert, Gutierrez's expert "actually did a labor market survey to determine availability of jobs for Enrique." We will not interfere with the commissioner's weighing of this evidence. *See id.* ("[I]n considering findings of industrial disability, we recognize that the commissioner is routinely called upon to make such assessments and has a special expertise in the area that is entitled to respect by a reviewing court.").

We turn to the deputy's finding concerning Gutierrez's lack of fluency in English, a factor that, according to the deputy, contributed to his inability to find employment. On intra-agency review, the commissioner determined this was not the salient factor in the earning capacity analysis. The commissioner stated, "[I]t is claimant's present physical impairment and work restrictions which greatly dominate the factors weighing towards the finding that he is fully disabled from performing work that his experience, training, education, intelligence and physical

capacities would otherwise permit." Nonetheless, the commissioner did not entirely discount Gutierrez's limited knowledge of English as a factor that reduced his earning capacity.

The commissioner's consideration of this factor was entirely appropriate. *See id.* at 526 ("Personal characteristics of the employee that affect employability may be considered."). Additionally, the commissioner's findings that Gutierrez was indeed limited in his knowledge of English and that this limitation adversely affected his employability are supported by substantial evidence in the record.

Gutierrez testified through an interpreter that he spoke "[v]ery little" English. He stated he obtained a certificate to work as a welder only because the training was conducted in Spanish.

As for the effect on his employability, Gutierrez's expert opined that English "classes alone would take years and would not be a short term solution to assist him in finding employment at this time." She based her opinion on information she obtained from an instructor of English as a second language at a local community college. According to the expert, this instructor told her "[c]orrect grammar with very, very, simple phrases could take six months" to learn and "it would take years to go from non speaking to [a] twelfth grade" level. The expert also cited an article discussing "the difficulty in mastering English and the amount of time required to acquire facility."

We recognize the employer's expert voiced a contrary opinion, stating Gutierrez "would . . . benefit from taking English as a second language classes." While this opinion may detract from a finding that Guiterrez's lack of English fluency affected his employability, the agency was free to give more credence to

Gutierrez's expert. *See Arndt v. City of Le Claire*, 728 N.W.2d 389, 394–95 (Iowa 2007) ("It is the commissioner's duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue."); *see also Neal*, 814 N.W.2d at 527 (noting fact findings are not insubstantial merely because evidence supports a different conclusion); *Larson Mfg. Co.*, 763 N.W.2d at 857 (stating that while factors emphasized by the employer "certainly mitigated the extent of industrial disability in this case, other substantial evidence in the record supported the determination made by the agency").

Because the commissioner's finding of 100% loss of earning capacity is supported by substantial evidence and its application of law to fact is not irrational, illogical, or wholly unjustifiable, we affirm the award of permanent total disability benefits.

AFFIRMED.