IN THE COURT OF APPEALS OF IOWA

No. 6-1087 / 06-1086
Filed April 11, 2007

TORY R. BENNETT,
Petitioner-Appellee,

vs.

THE DEXTER COMPANY, Employer
AND EMCASCO INSURANCE COMPANY,
Insurance Carrier,
Respondents-Appellants.

Appeal from the Iowa District Court for Jefferson County, Daniel P. Wilson, Judge.

Respondents appeal a district court decision which reversed the ruling of the workers' compensation commissioner. **REVERSED.**

Steven E. Ort of Bell, Ort & Liechty, New London, for appellants.

Janece Valentine of Valentine Law Office, P.C., Fort Dodge, for appellee.

Considered by Miller, P.J., and Baker, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.

I. Background Facts & Proceedings

On November 23, 1994, Tory Bennett, then age twenty-two, lost his right arm while employed as a production worker for The Dexter Company. After his injury, Bennett first worked as a security guard for a short period of time, then returned to work at Dexter as a forklift operator. In 1997, Bennett was awarded workers' compensation benefits based on a sixty-five percent industrial disability rating.

In January 1999, Dr. J. L. Marsh recommended Bennett leave his job at Dexter because he needed to twist his body to drive a forklift, resulting in considerable pain. Dr. Marsh recommended Bennett engage only in "strictly sedentary work where he is able to work straight in front of him." Bennett did not immediately follow this advice and continued working at Dexter until March 2000.

Bennett then admitted himself to the psychiatric department at the University of Iowa Hospitals and Clinics. Bennett was diagnosed with a major depressive disorder, post-traumatic stress disorder, and pain disorder. Dr. Janeta Tansey, a physician, and Dr. Carol Parker, a psychologist, recommended that Bennett not return to work at Dexter due to the risk of recurrence of his psychiatric symptoms. Dr. Parker stated Bennett's emotional problems were causally related to his 1994 injury. Dr. Parker recommended simple, routine work for Bennett.

Bennett did not return to work at Dexter. He worked part-time as a bartender but could not perform all of the job duties. He also had seasonable

employment at a turtle farm operated by a friend. Again, Bennett could not perform all of the job duties. A vocational counselor recommended that based on Bennett's interests and abilities he could obtain employment as a security guard, forklift driver, or livestock producer.

Bennett sought additional workers' compensation benefits in review-reopening proceedings, claiming his physical and mental condition had declined since the original award. After an administrative hearing, a deputy workers' compensation commissioner determined Bennett was "able only to perform simple work tasks in a sedentary position that does not require turning his body at any time." The deputy concluded Bennett should be considered totally disabled under the odd-lot doctrine, and awarded benefits accordingly.

The workers' compensation commissioner determined Bennett was not an odd-lot employee, stating "Tory did not introduce evidence that makes a prima facie showing of permanent total disability by a bona fide effort to find work or otherwise." The commissioner concluded Bennett was entitled to increased benefits, however, and determined he had a seventy-five percent industrial disability.

Bennett filed a petition for judicial review. The district court determined the commissioner had used the wrong standard in determining whether Bennett was an odd-lot employee. In *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 106 (Iowa 1985), the supreme court had stated that in order to come within the odd-lot doctrine an employee should demonstrate a reasonable effort to secure employment. The court later amended this standard in *Second Injury Fund v.*

Nelson, 544 N.W.2d 258, 267 (Iowa 1995), by stating that proof of a search for employment was "not an absolute prerequisite if the employee introduces other *substantial* evidence that he has no reasonable prospect of steady employment." (Emphasis in original). Important factors to consider in determining whether an employee comes within the odd-lot doctrine are physical impairment, intelligence, education, training, ability to be retrained, and age. *Nelson*, 544 N.W.2d at 268.

The district court concluded the commissioner had misstated the applicable standard in odd-lot cases by using the *Guyton* "job search" standard only, rather than analyzing the facts under the evolved analysis in *Nelson*. The court then applied the facts of the case under the *Nelson* standard and determined Bennett was an odd-lot employee. The court reversed the commissioner and reinstated the decision of the deputy.

The case next came before the Iowa Court of Appeals. We agreed with the district court that the commissioner had used the wrong standard to determine whether Bennett was an odd-lot employee, stating:

> The commissioner clearly determined Bennett did not come within the odd-lot doctrine because he had not made a bona fide effort to find work. Furthermore, there is no indication the commissioner considered any other relevant factors, such as Bennett's education or ability to be retrained, prior to rejecting Bennett's odd-lot theory.

Bennett v. Dexter Co., No. 03-1684 (Iowa Ct. App. Aug. 26, 2004). We concluded, however, that the appropriate remedy was to remand the case to the commissioner for application of the correct standard to determine whether Bennett came within the odd-lot doctrine. *Id.*

On remand, the commissioner stated he believed the court of appeals had misinterpreted his original decision. The commissioner went on to find:

> Tory did not make a bona fide effort to obtain permanent employment that is consistent with his abilities. That is not the end of the analysis, however. Tory failed [to] carry his burden to make a prima facie showing of total disability because he did not introduce evidence showing that he is incapable of obtaining and performing steady work in any well-known segment of the competitive employment market. None of the other possible methods were in evidence such as an expert opinion from a vocational consultant, an assessment from a physician or through any other lay or expert evidence.
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> . . . [Bennett] graduated from high school and performed acceptably. . . . Tory was found to have average intellectual skills and the records do not indicate that he was found to be incapable of competitive employment. A person with average intellectual skills is generally considered to have capacity for learning and retraining if reasonable effort is put forth. Tory has not put forth that reasonable effort. Nothing explains why he could not work as a security guard as he did for a time after losing his arm. Tory's insistence upon outdoor work is a self-imposed barrier to retraining and to obtaining steady work that is consistent with his disability. It was found that he had not made a bona fide effort to find permanent, full-time work. Tory hunts and fishes but he works when he needs to or wants to. Tory sustained a very serious injury and disability. However, others with a similar disability are employed and nothing in the record establishes that Tory is incapable of being employed. Despite Tory's lack of a serious effort to find work that is permanent and consistent with the upper limits of his abilities, he appears to have obtained work whenever he made an effort to do so.

The commissioner again concluded Bennett did not come within the odd-lot doctrine.

Bennett again filed a petition for judicial review. The district court found the commissioner continued "to cast Tory's failure to put forth a reasonable effort to obtain employment (and retraining) as the determinative factor in this case." The court concluded the commissioner still had failed to correctly apply the law to

the facts of the case. The court noted that when the commissioner commits an error in applying the law to the facts, the court should remand for a new decision unless the decision can be made as a matter of law. *See Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219-20 n.1 (Iowa 2006). The court then determined, as a matter of law, that Bennett came within the odd-lot doctrine.

Dexter and its insurance carrier appeal the decision of the district court.

II. Standard of Review

Our review is governed by the Administrative Procedure Act. Iowa Code ch. 17A (2001); *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 216 (Iowa 2004). We review the district court's decision by applying the standards of section 17A.19 to the agency action to determine if our conclusions are the same as those reached by the district court. *University of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

III. Legal Error

The employer claims the district court erred in finding the commissioner continued to use the wrong legal standard on remand. The case was initially remanded to the commissioner because he had not used the analysis in *Nelson*, 544 N.W.2d at 268, to determine whether Bennett had made a prima facie showing he came within the odd-lot doctrine. On judicial review after the commissioner's remand decision, the district court found that although the commissioner had cited to *Nelson*, he had not engaged in a genuine *Nelson* analysis, and the court concluded the commissioner had not properly applied the law in this case.

Under the odd-lot doctrine, an employee is considered totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." *Guyton*, 373 N.W.2d at 105. An employee has the burden of production of evidence to make a prima facie case showing the employee is not employable in the competitive labor market. *Nelson*, 554 N.W.2d at 267. The employee must produce substantial evidence he or she has no reasonable prospect of steady employment. *Id.* Important factors to consider are the claimant's physical impairment, intelligence, education, training, ability to be retrained, and age. *Id.* at 268.

If an employee produces substantial evidence deemed sufficient to create a prima facie case the employee comes within the odd-lot doctrine, the burden then shifts to the employer to produce evidence there is suitable employment for the employee. *Guyton*, 373 N.W.2d at 106. The ultimate burden of persuasion, however, remains with the employee. *Michael Eberhart Constr. v. Curtin*, 674 N.W.2d 123, 126 (Iowa 2004).

Our review of the commissioner's remand decision shows the commissioner properly applied the law regarding the odd-lot doctrine. The commissioner cited and discussed several factors which are relevant to an analysis under *Nelson*, for example, Bennett's physical impairment, his intelligence, education, training, and ability to be retrained, as well as the absence of expert testimony supporting Bennett's position. *See Nelson*, 544

N.W.2d at 268. We conclude the district court erred in ruling the commissioner continued to apply the wrong legal standard in this case.

IV. Matter of Law

The employer contends the district court erred in finding, as a matter of law, that Bennett came within the odd-lot doctrine. If the commissioner "has rendered a finding that the claimant's evidence is insufficient to support the claim under applicable law, that negative finding may only be overturned if the contrary appears as a matter of law." *Asmus v. Waterloo Community School Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). A finding may be made as a matter of law if the evidence is uncontroverted and reasonable minds could not draw different inferences from the evidence. *Bearce v. FMC Corp.*, 465 N.W.2d 531, 534 (Iowa 1991); *Armstrong v. State of Iowa Bldgs. & Grounds*, 382 N.W.2d 161, 165 (Iowa 1986).

Here, the commissioner determined Bennett had not presented a prima facie case that he came within the odd-lot doctrine. As the district court noted, that finding may be overturned only if the contrary appeared as a matter of law. *See Asmus*, 722 N.W.2d at 657. We determine the district court improperly found Bennett came within the odd-lot doctrine as a matter of law. The evidence was highly controverted on this issue, and, for the reasons we discuss in the following division, reasonable minds could draw different inferences from the evidence. We are unable to find that, as a matter of law, Bennett was incapable of obtaining employment in any well-known branch of the labor market. *See Guyton*, 373 N.W.2d at 105.

V. Substantial Evidence

We turn to the question of whether there is substantial evidence in the record to support the commissioner's conclusion Bennett did not present a prima facie case to show he came within the odd-lot doctrine. We are bound by the commissioner's factual findings if they are supported by substantial evidence in the record as a whole. *Meyer,* 710 N.W.2 at 218. Evidence is substantial when a reasonable person could accept it as adequate to reach the same finding. *Asmus*, 722 N.W.2d at 657. The question is not whether we agree with the commissioner's findings, but whether there is substantial evidence in the record to support the findings made by the commissioner. *Meyer*, 710 N.W.2d at 218. "The fact that an agency could draw two inconsistent conclusions from the evidence presented to it does not mean that one of those conclusions is unsupported by substantial evidence." *Armstrong Tire & Rubber Co. v. Kubli*, 312 N.W.2d 60, 63 (Iowa Ct. App. 1981). We are instructed to liberally and broadly construe the findings of the commissioner, as the commissioner, not the appellate court, is charged with weighing the evidence. *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 330-331 (Iowa 2005)

In *Nelson*, the employee presented evidence from medical and vocational experts that he could not work in the competitive job market. *Nelson*, 544 N.W.2d at 268. As the commissioner noted, Bennett did not present "expert opinion from a vocational consultant, an assessment from a physician or through any other lay or expert evidence," giving such an opinion. Bennett had medical restrictions, but there was no medical evidence he was incapable of working.

Also, a vocational assessment recommended employment as a security guard, forklift driver, or livestock farmer, as types of employment within Bennett's interests and abilities.[1]

Bennett testified at the administrative hearing he did not believe he would have any problem working as a security guard. He also stated he would be able to work as a clerk at a convenience store. He testified he had not continued to participate in vocational rehabilitation because he did not like the jobs they wanted him to do. Bennett stated he would prefer working outside and that he rejected some employment because it was not outside work. Based on the evidence in the record, there is substantial evidence to support the commissioner's finding that Bennett had failed to present a prima facie case that he was incapable of finding work in any established branch of the labor market.

We reverse the decision of the district court and reinstate the decision of the workers' compensation commissioner.

REVERSED.

[1] It is unclear whether the author of this recommendation was aware there was a medical recommendation against employment as a forklift operator.