

IN THE COURT OF APPEALS OF IOWA

No. 6-1092 / 06-1238
Filed March 14, 2007

**MT. AYR COMMUNITY SCHOOLS
AND EMC INSURANCE COMPANIES,**
Petitioners-Appellants,

vs.

PHILIP A. BURMEISTER,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson,
Judge.

The employer and its insurance carrier appeal the district court decision affirming the ruling of the workers' compensation commissioner that awarded an employee benefits as an odd-lot employee. **AFFIRMED.**

Matthew A. Grotnes of Hopkins & Huebner, P.C., Des Moines, for appellants.

Charles E. Cutler and Jack H. Pennington of Cutler Law Firm, P.C., West Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer, 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**

Philip Burmeister was employed as the superintendent of schools for the Mt. Ayr Community School District. Burmeister injured his back on August 20, 1997, during the course of his employment. He has had three back surgeries, which have not improved his condition. In 2001 Burmeister took early retirement from his job because back pain prevented him from fulfilling his job duties. He spends one to three hours each day as a volunteer for the Ramsey Farm Foundation, where he acts in a supervisory capacity.

In January 2002, Burmeister was diagnosed by Dr. Jack Przybyl as having chronic low back pain secondary to failed back surgery syndrome. Dr. Przybyl stated Burmeister could not work an eight-hour day. Dr. Bruce Ricker also gave the opinion Burmeister could not work full-time. Later in 2002, Dr. Amy Stockman diagnosed Burmeister with depression, which she found was likely related to his back pain. Burmeister's depression was considered to be in remission as of April 2003. Roger Marquardt, a vocational specialist, determined Burmeister was eliminated from performing any type of competitive employment for which he was suited.

Burmeister sought workers' compensation benefits. After an administrative hearing, a deputy workers' compensation commissioner determined Burmeister made a prima facie showing he was not employable in the competitive labor market and was an odd-lot employee. The deputy found the employer failed to produce evidence showing the availability of suitable

employment. The deputy concluded Burmeister should be considered permanently totally disabled under the odd-lot doctrine. The deputy also found Burmeister's depression was causally connected to his back injury, and the employer should pay his medical expenses related to depression. The commissioner affirmed the deputy's decision.

The employer filed a petition for judicial review, claiming the commissioner erred in finding Burmeister was an odd-lot employee, and in finding his depression was causally connected to his back injury. The district court determined there was substantial evidence in the record to support the commissioner's decision. The employer appeals.

II. Standard of Review

Our review is governed by the Administrative Procedure Act. Iowa Code ch. 17A (2003); *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. Odd-Lot Doctrine

An employee is considered an odd-lot employee if an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. *Michael Eberhart Constr. v. Curtin*, 674 N.W.2d 123, 125 (Iowa 2004). An employee is considered totally disabled under the odd-lot doctrine if the only jobs the employee could perform are "so limited in quality, dependability, or

quantity that a reasonably stable market for them does not exist” *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 105 (Iowa 1985) (citation omitted). A person who has no reasonable prospect of steady employment is considered to have no earning capacity. *Id.*

In order to come within the odd-lot doctrine an employee must meet the burden of production of evidence to make a prima facie case of total disability by producing substantial evidence that the employee is not employable in the competitive labor market. *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 267 (Iowa 1995). An employee can meet this burden by demonstrating a reasonable, but unsuccessful, effort to secure employment. *Guyton*, 373 N.W.2d at 105. Alternatively, an employee can introduce substantial evidence of no reasonable prospects of steady employment. *Nelson*, 544 N.W.2d at 267. Important factors to consider in determining whether an employee comes within the odd-lot doctrine are the employee’s physical impairment, intelligence, education, training, ability to be retrained, and age. *Id.* at 268.

“Under the odd-lot doctrine, once the claimant establishes a prima facie case of entitlement, the burden of going forward with evidence that jobs are available shifts to the employer.” *Michael Eberhart Constr.*, 674 N.W.2d at 127. If the employer fails to produce evidence jobs are available for the employee, the worker is entitled to a finding of total disability. *Guyton*, 373 N.W.2d at 106.

The employer contends there is not substantial evidence in the record to support the commissioner’s determination that Burmeister comes within the odd-lot doctrine. On appeal, we are bound by the commissioner’s factual findings if

they are supported by substantial evidence when the record is viewed as a whole. *Simonson v. Snap-On Tools Corp.*, 588 N.W.2d 430, 434 (Iowa 1999).

We determine there is substantial evidence in the record to support the commissioner's conclusions. The evidence shows Burmeister has a physical impairment due to back pain, and he is unable to work full-time. Burmeister has the intelligence, education, and training to obtain employment, but because of his back condition is unable to continue working. Burmeister was sixty years old at the time of the administrative hearing in 2004. The evidence showed Burmeister was able to perform volunteer work of a supervisory nature for one to three hours each day, and then needed to rest.

The evidence supports a prima facie showing Burmeister was an odd-lot employee. The employer did not present evidence of jobs available to Burmeister which he could perform. We affirm the commissioner's conclusion that Burmeister should be considered totally disabled under the odd-lot doctrine.

IV. Depression

The employer also contends there is not substantial evidence in the record to show Burmeister's depression was causally connected to his back injury. On this issue the deputy stated:

Both Dr. Ricker and Ms. Stockman have opined claimant's depression is related to or caused by claimant's back injury. Defendants are correct that claimant was not diagnosed with depression until November 5, 2002. Defendants have failed to offer the opinions of any experts indicating claimant's depression was not caused by his work-related back injury.

Thus, the only evidence in the record, the opinions of Dr. Ricker and Dr. Stockman, supports a finding that Burmeister's low back pain was the primary

cause of his depression. We find there is substantial evidence in the record to support the commissioner's findings on this issue.

We affirm the decisions of the district court and the workers' compensation commissioner.

AFFIRMED.