IN THE COURT OF APPEALS OF IOWA

No. 7-191 / 06-0367
Filed June 27, 2007

MINERVA VILLELA,
Petitioner-Appellant/Cross-Appellee,

vs.

LUND FOOD HOLDINGS, INC., LUND FOOD, INC., TRAVELERS INSURANCE COMPANY,
Respondents-Appellees/Cross-Appellants,

FIREMAN'S FUND INSURANCE COMPANY and SECOND INJURY FUND OF IOWA,
Respondents-Appellees.

Appeal from the Iowa District Court for Winnebago County, James M. Drew, Judge.

Minerva Villela appeals from the district court's ruling on judicial review affirming the workers' compensation commissioner's decisions on her claims for workers' compensation benefits. **AFFIRMED.**

Mark S. Soldat, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Julie A. Burger, Assistant Attorney General, for appellee Second Injury Fund of Iowa.

Jeffrey W. Lanz of Huber, Book, Cortese, Happe & Lanz, P.L.C., West Des Moines, for appellee Fireman's Fund Insurance Company.

John E. Swanson of Hansen, McClintock & Riley, Des Moines, for appellees Lund Food Holdings, Inc. and Travelers Insurance Company.

Heard by Mahan, P.J., and Eisenhauer and Baker, JJ.

BAKER, J.

Minerva Villela appeals from the district court's ruling on judicial review affirming the workers' compensation commissioner's decisions on her claims for benefits.[1] She asserts the district court erred in affirming the commissioner's (1) dismissal of her second injury fund claims, (2) failure to award temporary partial disability benefits for periods she worked under restricted duty, (3) failure to award permanent partial disability benefits for various work injuries, (4) finding she suffered a thirty percent industrial disability, (5) computation of weekly compensation rates based on her leaving work early without pay, (6) refusal to award certain transportation expenses, and (7) failure to award additional penalty payments. Lund Food (Lund) and Travelers cross-appeal the industrial disability award and the selection of February 22, 2000 as an injury date.

I. Background and Facts

Minerva Villela has been employed with Lund, a food processing facility, and its predecessor, Byerly's, since February 1990. She has worked primarily in the vegetable preparation department. Her work involves repetition with her hands and arms and lifting, pushing, and pulling materials. Villela began having hand and arm pain within a year of employment at Lund.

Prior to the work-related injuries at issue in this appeal, Villela experienced significant physical problems. She was diagnosed as diabetic in 1977. In 1986, she suffered a fracture to her left arm, and she fractured her ankle in 1992. She

[1] Villela seeks workers' compensation benefits from Iowa's second injury fund, and from Lund Food Holdings, Incorporated, Lund Food, Incorporated, and its insurance carriers, Fireman's Fund Insurance Company, prior to January 1, 2000, and Travelers Insurance Company, effective 12:01 A.M. on that date.

has previously sought treatment for tendinitis and arm, finger, and hand numbness, swelling and pain. In 1996, she developed an ulcer on her right foot.

Between September 1997 and November 2000, Villela suffered eight separate injuries, which are the subject of this appeal. Most relate to the cumulative injury of her neck, shoulders, arms, fingers, and wrists. Her July 2000 injury occurred when she was struck in the head by a door, causing headaches, dizziness, and memory loss. She has seen several health care providers and been diagnosed with various conditions, including bilateral carpal tunnel syndrome and right lateral epicondylitis (tennis elbow). Health care providers have repeatedly advised her to end her repetitive work. Villela is unable to leave her job for financial reasons. In January 2000, she was assigned to lighter duty to accommodate her various hand and arm problems, but she returned to full duty in March 2002, when Lund refused to continue the accommodation.

In December 2000, Villela filed workers' compensation claims against Lund and its insurers and Iowa's second injury fund. Because permanency issues remained on two injuries, the proceedings were bifurcated and resulted in two decisions by a deputy commissioner, filed on July 29, 2002, and November 26, 2003. Villela appealed. In decisions filed May 30, 2003, and August 16, 2005, the workers' compensation commissioner affirmed the deputy and (1) awarded Villela permanent partial disability benefits based on a fifteen-percent body as a whole impairment caused by carpal tunnel syndrome, (2) found she sustained a thirty-percent industrial disability caused by her regional pain condition, with an injury date of February 22, 2000, (3) refused to award

permanent partial disability benefits for the other injury dates, (4) denied the second injury fund claim, (5) refused to award temporary partial disability benefits for periods she worked under restricted duty, (6) affirmed the use of a weekly compensation rate that considered voluntary absences from work, (7) refused to reimburse $9.86 for meal expenses, (8) refused to award additional penalty payments, and (9) selected February 22, 2000 as an appropriate injury date. Villela petitioned for judicial review. The district court affirmed the commissioner's decision. Villela appeals. Lund and Travelers cross-appeal.

II. Standard of Review

We review decisions of administrative agencies for correction of errors at law. *Kostelac v. Feldman's, Inc.,* 497 N.W.2d 853, 856 (Iowa 1993). Agency decisions carry the weight of a jury verdict. *Id.* We are bound by the commissioner's findings of fact if supported in the record as a whole and will reverse the agency findings only if we determine that substantial evidence does not support them. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006); *see also Terwilliger v. Snap-On Tools Corp.,* 529 N.W.2d 267, 271 (Iowa 1995) (declining to apply scrutinizing analysis to agency decisions). The definitive question is not whether the evidence supports a different finding, but whether the evidence supports the findings that were actually made. *Meyer*, 710 N.W.2d at 218.

"We are not bound, however, by an agency's erroneous conclusions of law." *Kostelac,* 497 N.W.2d at 856. We allocate some degree of discretion in

our review of the application of the law to the facts, but not the breadth of discretion given to the findings of fact. *Meyer*, 710 N.W.2d at 218-19.

III. Merits

Villela argues the district court erred in affirming the commissioner's decisions on seven issues. Lund and Travelers contend the court erred on two.

A. Second Injury Fund

Villela asserts the district court erred in affirming the commissioner's dismissal of her second injury fund claims. The fund's primary purpose is to encourage employers to hire persons with disabilities by reducing the risk of increased workers' compensation costs that might otherwise be associated with hiring a person who has previously suffered a "permanent disability." *Anderson v. Second Injury Fund*, 262 N.W.2d 789, 792 (Iowa 1978). The fund may be liable for a portion of an industrial disability caused by two successive injuries

> when (1) the employee has either lost or lost the use of a hand, arm, foot, leg, or eyes; (2) the employee sustained the loss, or loss of use of another such member or organ through a work related injury; and (3) there is some permanent disability from the injuries.

Haynes v. Second Injury Fund, 547 N.W.2d 11, 13 (Iowa Ct. App. 1996); *see also* Iowa Code § 85.64 (1999). The prior loss of use need not be work related, and it does not have to be a total loss of use. *Second Injury Fund v. Shank*, 516 N.W.2d 808, 812-13 (Iowa 1994). While an impairment rating or expert medical evidence are generally used to establish the permanency of an injury, they are not always required. *Haynes*, 547 N.W.2d at 13-14.

Villela fractured her ankle in a nonwork-related accident in 1992. She had a subsequent work-related injury in 1996, when she bumped her leg against a

pallet and was treated for the resulting ulcer and infections. In affirming the commissioner's decision, the district court found that, although she had obviously injured her foot, there had been no permanent impairment or loss of use. We agree. While the record indicates Minerva has experienced scarring, decreased sensation, swelling, and pain in her left ankle, the evidence does not show Villela had any significant loss of use of her ankle or any restrictions on the use of her leg. These injuries are not the type of "permanent disability" injury for which the second injury fund was intended. *See Anderson*, 262 N.W.2d at 791 ("The source of this pre-existing disability . . . must be permanent and must tend to act as a hindrance to the individual's ability to obtain or retain effective employment."). We find no error in the denial of her second injury fund claim.

B. Temporary Partial Benefits

Villella contends the district court erred in affirming the commissioner's failure to award temporary partial benefits under Iowa Code section 85.33 without applying the statutory formula for calculating such benefits. Villela has been restricted in her duties on an intermittent basis. The commissioner found there was no showing that Villela's hours of work or rate of pay were reduced due to her work restrictions and determined the deputy correctly denied benefits. The district court held that, even though it was "possible that the commissioner and deputy used a 'shortcut' to analyze this issue, . . . any error that might have been committed in applying the statute was harmless."

Temporary partial disability benefits are payable because of a reduction in an employee's earning ability when suffering from an injury. If an employee is

temporarily, partially disabled and the employer offers work within the employee's restrictions, the employee must accept the work and may then be compensated with temporary partial benefits. Iowa Code § 85.33(3). If the employee refuses the suitable work, "the employee will not be compensated with temporary partial . . . benefits during the period of the refusal." *Id.* Iowa Code section 85.33(2) provides for benefits for a "temporary partial reduction in earning ability as a result of the employee's temporary partial disability." Because the reduction in earning ability must be "as a result of" the injury, not other absences, an employee need not be paid the benefit if absences were due to other reasons.

The record supports the determination that Villela did not lose income due to temporary partial disability. Any reduction in her earnings while she was on restricted duty was attributable to factors (e.g. voluntarily leaving early) other than her disability. Because there was no loss of earnings due to disability, the application of the statutory formula for calculating such benefits does not even come into play. We affirm the district court's decision on this issue.

C. Permanent Partial Benefits

Villela contends the district court erred in affirming the commissioner's failure to award permanent disability compensation for five cumulative injuries.[2] The court affirmed the holding that Villela suffered injuries to various parts of her upper extremities and that the injuries were work related. The court found the agency's denial of permanent partial benefits was supported by "ample evidence

[2] Injuries dated September 26, 1997 (right elbow); June 3, 1998 (right shoulder, elbows, wrists); December 24, 1998 (wrists); August 5, 1999 and September 27, 1999 (fingers).

in the record" that Villela had no permanent impairment to her elbows, fingers, shoulder, and neck. We find no error in the district court's holding.

D. Industrial Disability

Villela contends the thirty percent industrial disability award for the February 22, 2000, [3] injury is too low because the "small award was not logical or supported by substantial evidence." Lund and Travelers contend the thirty percent industrial disability is "contrary to the overwhelming evidence and the applicable law."[4]

> Industrial disability measures an injured worker's lost earning capacity. Factors to be considered include the employee's functional disability, age, education, qualifications, experience, and the ability of the employee to engage in similar employment. The focus is not solely on what the worker can or cannot do; industrial disability rests on the ability of the worker to be gainfully employed.

Myers v. F.C.A. Servs., *Inc*., 592 N.W.2d 354, 356 (Iowa 1999) (citing *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 157 (Iowa 1996)). "If the evidence relating to these criteria is substantial when the record is viewed as a whole, the Commissioner's decision must be sustained." *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 831 (Iowa 1992).

The district court found the deputy engaged in a detailed analysis, which was adopted by the commissioner, and that the deputy considered the appropriate facts and correctly applied the law to determine the industrial disability award. We agree with the court's conclusion that "there is no basis for

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[3] February 22, 2000, is the date designated by the deputy as the most appropriate manifestation date for Villela's neck, shoulder, and upper back chronic pain syndrome.

[4] We echo the district court's questioning of "how the parties, presumably acting in good faith, can have such differing views of the same evidence," and we agree "[t]he truth probably lies somewhere in the middle."

changing the commissioner's decision on this issue." *See Myers*, 592 N.W.2d at 357 ("The industrial commissioner is not required to fix disability with precise accuracy."); *Second Injury Fund v. Bergeson,* 526 N.W.2d 543, 546 (Iowa 1995) (noting this court prefers to defer to the commissioner's expertise on this issue).

Villela argues "the commissioner's award is the result of a misapplication of the law," because it considered the continuation of her accommodated work and failed to explain "how the evidence warranted as low as a 30% industrial disability determination." She contends there is no evidence or rationale in the record that there was work available for her in the competitive job market.

> In measuring a claimant's loss of earning capacity, . . . an employer's accommodation . . . may only be considered if such accommodation would be available in the general labor market. Otherwise, the loss of earning capacity must be based on the injured worker's present ability to earn in the competitive job market without regard to any accommodation furnished by that person's present employer.

Ellingson v. Fleetguard, Inc., 599 N.W.2d 440, 445 (Iowa 1999) (citations omitted).

The deputy found Villela "demonstrated a loss of the opportunity to return to past jobs," and, although she offered no evidence to show loss of future job opportunities, "there probably are some." "Given the fact that she continues to happily work at Lund, despite her pain without loss of income," the deputy found Villela entitled to a thirty percent award. In affirming the deputy's decision, the commissioner stated she "has permanent physical impairment and permanent activity restrictions that affect her access to jobs. In view of [her] lack of skills for other types of work and limited education, her prospects for work with other

employers is bleak." We find the agency appropriately considered, and sufficiently explained, Villela's present ability to work in the job market.

Lund and Travelers contend the evidence fails to support any award because there has been "no lost income, no lost earning capacity, and no impairment to Villela's ability to earn wages." While an actual reduction in earning capacity may be important in establishing an industrial disability, it is not essential to a determination that an employee has suffered a loss of earning capacity. *Oscar Mayer*, 483 N.W.2d at 831. Villela's continued full-time employment does not preclude an industrial disability award. Further, the record contains sufficient evidence to support the agency's determination that her injuries have caused a permanent impairment to her ability to earn wages.

We conclude the district court correctly applied the law in affirming the agency. It is clear the agency considered appropriate factors, including Villela's inability to engage in similar employment. "[T]he Commissioner is entitled to draw reasonable inferences based upon the evidence presented." *Id.* It was reasonable to conclude, viewing the record as a whole, that Villela sustained a thirty percent loss of earning capacity.

E. Compensation Rates

Villela next argues the district court erred in affirming the commissioner's computation of the compensation rates. She contends that, rather than the hours she customarily worked, her weekly rate computation should have been based on "what hours she could have worked because she was 'entitled' to them."

An injured employee's computation rate is based on his or her weekly earnings at the time of the injury. Iowa Code § 85.36.

> Weekly earnings means gross salary, wages, or earnings of an employee *to which such employee would have been entitled had the employee worked the customary hours* for the full pay period in which the employee was injured, as *regularly required* by the employee's employer.

Id. (emphasis added).

"[T]he focus of the statute is on the 'customary hours' the employee is 'regularly required' to work." *Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 866 (Iowa 2003). Weeks that contain absences due to causes such as illness and vacation are routinely excluded from the calculation because they are not representative of a customary week. *Id.*; *see, e.g., Weishaar v. Snap-On Tools Corp.*, 582 N.W.2d 177, 182 (Iowa 1998) (excluding several weeks in which employee worked less than forty hours was not error because the customary week was forty hours); *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 619 (Iowa 1995) (holding, although employee "worked less than forty hours during seven of the thirteen weeks immediately prior to the injury date, . . . [t]he customary hours for the full pay period for her job were . . . a forty-hour week").

The issue then is whether Villela's hours of work in the weeks used to calculate her weekly rate are typical of the hours customarily worked. If a forty-hour week was customary for Villela, then forty hours must be used as the basis of her weekly rate computation. The agency properly calculated Villella's rate based on actual hours because those hours reflected the customary hours she typically worked. Villela worked forty or more hours in only thirteen of the thirty-

seven weeks from January to September 1997. Villela testified that it was typical for her to take time off on an afternoon when Lund was not busy. There is substantial evidence to conclude that a forty-hour week was not customary.

Villela also asks this court to direct the commissioner on remand to address the computation of the weekly rate for the September 27, 1999 injury. This issue has not been addressed by the deputy, commissioner, or district court. "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (citations omitted); *see also* Iowa R. Civ. P. 1.904(2); *Cripps v. Iowa Dep't of Transp.*, 613 N.W.2d 210, 212 (Iowa 2000) (applying rule 1.904(2) in a judicial review proceeding). Villela did not request a ruling from the district court on this issue. As this issue has not been preserved, we decline to address it.

F. Transportation Expenses

Villela asserts the district court erred in affirming the agency's failure to award $9.68 in food expenses she incurred en route to a doctor's visit. The deputy initially ruled there was no evidence in the record to award the expense. When the receipts were brought to his attention, the deputy again refused, stating "just dumping a receipt in the record and arguing it is connected does not establish a causal connection." We agree with the district court "there is no basis for reversing the agency's determination" on this trivial issue.

G. Penalty

Villela next contends she should have been awarded a penalty for nonpayment of permanent partial disability compensation. She asserts that, even though Fireman's was advised of her injuries, it failed to take affirmative action to learn whether the injury to her carpal tunnels caused permanent functional disability or to pay any permanent partial disability for the injury. She also contends a penalty should be imposed against Travelers for its failure to pay partial permanent disability benefits for her February 22, 2000 injury because Travelers produced no evidence of a reasonable excuse for the delay.[5]

> [A]n employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

On April 24, 2000, and on January 30, 2002, Dr. Ciota indicated Villela had a zero percent impairment rating. On December 4, 2000, Dr. McMains gave

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[5] In her reply brief, Villela argues,

> [t]he issue is not whether these defendants could identify evidence in the record which theoretically *might* have constituted a reasonable excuse for not paying . . . . Rather, the issue was whether the defendants offered evidence by which to carry their burden of proof that a reasonable excuse *was* in fact the reason that compensation was not paid when due.

Villela cites no legal authority to support an argument that the "reasonable excuse" must "in fact" be the reason compensation was not paid. Therefore, we need not consider this argument. *See* Iowa R. Civ. P. 6.14(1)(*c*). Further, in considering whether a reasonable excuse exists, "[t]he focus is on whether timely payment of the benefits due was made and if not, whether there was a reasonable excuse for the failure to make timely payment." *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996).

Villela a zero percent impairment rating. It was not until February 13, 2002, following an independent evaluation by Dr. Ban, that a permanent impairment rating was provided. Because "at least two doctors ha[d] opined that these injuries resulted in no permanent impairment," the deputy found the claim was "fairly debatable" and denied the claim for penalty benefits. The record supports the district court's conclusion that Villela "did not have a ratable disability as late as January 30, 2002," making her claims "fairly debatable."

The more troublesome delay is that which occurred between February 13, 2002, the date of Dr. Ban's impairment rating, and June 19, 2002, during which Fireman's failed to pay any permanent partial disability. Fireman's contends that, because "three[6] physicians had provided 0% impairment ratings," it had a basis to not pay the claim. We disagree with Fireman's contention that Villela's claim for a penalty is "totally without merit." Further, Fireman's cites no authority to support it was reasonable, in the face of a current impairment rating, to rely for an additional four months on the previous opinions. We will, however, reverse an agency's findings only if we determine that substantial evidence does not support them. *Meyer*, 710 N.W.2d at 218. The previous zero percent impairment ratings provide sufficient "substantial evidence" to support the district court's affirmation on this issue. *See Murillo v. Blackhawk Foundry*, 571 N.W.2d 16, 17 (Iowa 1997) ("The mere fact that we could draw inconsistent conclusions from the same evidence does not mean the commissioner's conclusions were unsupported by substantial evidence."); *see also Craddock*, 705 N.W.2d at 307-08 (finding permanent partial disability was "fairly debatable" where employer believed

employee had not sustained an industrial disability based on physician's written release); *Christensen,* 554 N.W.2d at 261 (holding a two-month delay was reasonable in light of prior medical records indicating employee would recover).

Villela next contends the fifty-percent penalties that were awarded were incorrectly calculated.[6] Villela did not request a ruling from the trial court on this issue pursuant to rule 1.904(2). As the issue regarding these insignificant amounts has not been preserved for our review, we will not address it.

H. Injury Date

Lund and Travelers contend the district court erred in affirming the commissioner's selection of February 22, 2000, as the injury date. They assert they "went to hearing and litigated based on an alleged injury date of November 30, 2000," and were therefore deprived of "notice *and* the opportunity to defend" because there was no notice of a February 22, 2000 injury date until after the hearing. Therefore, they assert, because no injury was found to have occurred on November 30, 2000, the injury date alleged by Villela, the thirty percent industrial disability award for the February 22, 2000 injury should be reversed.

Because it is an inherently fact-based determination, the agency is entitled to a substantial amount of latitude in making a determination regarding the date of injury. *Oscar Mayer*, 483 N.W.2d at 829. It may "consider a multitude of factors such as absence from work because of inability to perform, the point at which medical care is received, or others, none of which is necessarily dispositive." *Id.* at 830. Determining whether an employer was sufficiently

[6] Villela contends the $116.47 penalty should have been $142.64, and the $851.51 penalty should have been $886.84.

informed of the alleged basis for the employee's claim is also a matter within the agency's discretion. *Univ. of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 96 (Iowa 2004). Accordingly, our review of this issue is for an abuse of discretion. *Id.*

> [W]ith respect to agency adjudications, due process requires that a party "be informed somehow of the issue involved in order to prevent surprise at the hearing and allow an opportunity to prepare . . . . The test is fundamental fairness, not whether the notice meets technical rules of common law pleading."

Oscar Mayer, 483 N.W.2d at 828 (quoting *Wedergren v. Bd. of Dirs.,* 307 N.W.2d 12, 16 (Iowa 1981)). To establish a due process violation, a showing of prejudice is required. *Oscar Mayer*, 483 N.W.2d at 828.

We agree Lund had adequate notice of Villela's cumulative injury. Her petition states the injury occurred "cumulatively and progressively" and affected "both upper extremities, including shoulders, neck, and upper back." While the petition states an injury date of approximately November 30, 2000, it also notes disability dates throughout 1999. Because Villela's petition was filed within two years of the determined injury date, there is no statute of limitations issue, and therefore no prejudice to Lund. Additionally, because Lund had detailed knowledge of Villela's injury and treatment records, there was no unfair surprise. In affirming the February 22, 2000 injury date, the district court did not exercise its discretion on untenable grounds, nor was its exercise of discretion clearly erroneous. *See IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000) (noting an abuse of discretion occurs when the district court has exercised its discretion on clearly untenable or unreasonable grounds). We affirm on this issue.

IV. Conclusion

Because Villela's 1992 ankle fracture did not result in a permanent impairment or loss of use, we affirm the district court's denial of her second injury fund claim. Because the record supports the determination that she did not lose income due to temporary partial disability, we affirm the court's refusal to award temporary partial benefits. We affirm the court's refusal to award permanent partial disability for the injuries to Villela's elbows, fingers, shoulder, and neck. We also affirm the thirty-percent industrial ability award because the agency considered appropriate facts, including Villela's inability to engage in similar employment, and correctly applied the law. As there was substantial evidence to support the conclusion that a forty-hour week was not customary, we affirm the calculation of her weekly rate based on actual hours worked. There is no basis for reversing the agency's determination on the $9.68 food expense. We affirm the court's denial of her claim for additional penalty benefits because there is sufficient substantial evidence to find her claims for permanent partial disability were "fairly debatable." Finally, because Lunds was not unfairly deprived of its due process rights, the court did not abuse its discretion in affirming the February 22, 2000 injury date. We have carefully considered all issues raised on appeal and find they have no merit or are effectively resolved by the foregoing. The judgment of the district court is affirmed.

AFFIRMED.