IN THE COURT OF APPEALS OF IOWA

No. 7-214 / 06-1351

Filed May 23, 2007

JOSE ESTUDILLO,

Petitioner-Appellant,

vs.

IBP, INC., n/k/a TYSON FOODS, INC.,

Respondent-Appellee.

Appeal from the Iowa District Court for Des Moines County, R. David Fahey, Judge.

Jose Estudillo appeals from the ruling denying his petition for judicial review. **AFFIRMED.**

Daniel D. Bernstein and William J. Bribriesco of William J. Bribriesco & Associates, Bettendorf, for appellant.

James Drury, Dakota City, Nebraska, for appellee.

Heard by Vogel, P.J., and Miller and Baker, JJ.

VOGEL, P. J.

Workers' compensation claimant Jose Estudillo appeals from the district court's affirmance of the Workers' Compensation Commissioner's decision. Finding substantial evidence supporting the commissioner's decision, we affirm.

Background Facts and Proceedings.

Jose Estudillo began to work for IBP in 1988 as a meat cutter and is characterized by his most recent supervisor as a good worker. On October 16, 2000, while performing the job of "popping tongues," a hog carcass fell on Estudillo, causing injury to his shoulder and back. Dr. David Paul examined Estudillo the same day, concluding he had "muscle strains" and ordering medications, physical therapy, and rest. During a follow-up examination in November, Dr. Paul ordered an MRI on Estudillo's back. Based on his review of this MRI, Dr. Paul's assessment was that Estudillo suffered from facet arthritis and recommended fairly conservative treatment. In February 2001, Estudillo underwent a functional capacity evaluation, and was given permanent work restrictions by Dr. Paul.

At the request of IBP, Dr. Dale Minner examined Estudillo on April 10, 2001, for purposes of determining his permanent impairment and restrictions. Dr. Minner began his report by noting the numerous times Estudillo had been seen by him in the past and concluded that his current complaints were "moderate symptom magnification." He gave Estudillo a zero percent impairment rating, and opined he could perform light work, with some restrictions on physical motions. After his return to work, Estudillo was given light duty work, sharpening

scissors and distributing workers' supplies. He was later moved to a position "cutting gams," also considered light work.

On October 11, 2001, Estudillo reported that a hog fell off a table and landed on his left ankle. He also claims to have hurt his back while raising himself to a standing position, as he reacted to the force of the hog hitting his ankle. The following day, physician's assistant Thomas Dean assessed Estudillo as having subjective pain, without objective findings. A follow-up with Dr. Minner echoed this finding. Estudillo was given an elastic ankle brace and/or some type of support insole to wear inside his shoe until the pain subsided.

On October 21, Estudillo fell off a ladder while at a property that he owns, suffering multiple injuries, which necessitated him to undergo a craniotomy. Estudillo later claimed he fell due to his inability to keep his balance while wearing the insole support. As a result of his injuries, Estudillo was off work from October 21, 2001 until April 29, 2002.

Based on these incidents, Estudillo filed two workers' compensation petitions. The first, file number 5004153, alleged he had suffered an injury on October 16, 2000 when the hog fell on him, injuring his back, neck, and shoulders. The second petition, file number 5004154, alleged he had suffered a compensable injury on October 21, 2001 while climbing the ladder. He later amended the second petition to state the injury occurred on October 11, 2001, when the hog fell on his foot; however, he continued to argue that the October 21 injury was a result of the October 11 injury.

Following a hearing, the Deputy Workers' Compensation Commissioner issued a decision concluding that the October 16, 2000 injury was the cause of a

permanent disability that resulted in Estudillo sustaining a ten percent industrial disability. However, the deputy did not award penalty benefits for IBP's failure to pay permanent partial disability, reasoning the claim was fairly debatable. Additionally, the deputy concluded Estudillo suffered no temporary or permanent disability following his October 11, 2001 work incident. He also found that Estudillo had not proved the fall he suffered away from his employment was related to the October 11, 2001 incident. The Workers' Compensation Commissioner affirmed and adopted the decision of the deputy. On judicial review, the district court affirmed as well. Estudillo appeals.

Scope of Review.

Our review is governed by the Administrative Procedure Act. Iowa Code ch. 17A (2005); *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).

We are bound by the commissioner's factual findings if they are supported by substantial evidence in the record as a whole. *See Meyer v. IBP, Inc.,* 710 N.W.2d 213, 218 (Iowa 2006). Evidence is substantial when a reasonable person could accept it as adequate to reach the same finding. *Asmus v. Waterloo C'mty School Dist.,* 722 N.W.2d 653, 657 (Iowa 2006). 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. *Arndt v. City of Le Claire*, 728 N.W.2d 329, 394 (Iowa 2007); *Finch v. Schneider Specialized Carriers, Inc.,* 700 N.W.2d 328, 330-331 (Iowa 2005).

October 16, 2000 Injury.

Estudillo first contends a "preponderance of the evidence shows that [he] sustained greater than a ten percent industrial disability as a result of the October 16, 2000 work injury." In particular, he asserts he sustained an industrial disability in the range of thirty-five to forty-five percent. He believes the permanent restrictions placed on him along with his impairment ratings argue in favor of a higher level of industrial disability.

Industrial disability is based upon a loss in earning capacity, which is determined by considering "the employee's functional impairment, age, education, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining to the extent any of these factors affect the employee's prospects for relocation in the job market." *Hill v. Fleetguard, Inc.,* 705 N.W.2d 665, 673 (Iowa 2005). "The law requires the commissioner to consider all evidence, both medical and nonmedical, in arriving at a disability determination." *Terwilliger v. Snap-On Tools Corp.,* 529 N.W.2d 267, 273 (Iowa 1995).

First, the record contains conflicting evidence concerning Estudillo's functional impairment. In April 2001, Dr. Minner provided a zero percent impairment rating under the AMA Guidelines, noting some "symptom magnification." However, following an examination in June 2003, Dr. Richard Neiman gave Estudillo a 14.5% impairment rating. The deputy discounted this later opinion as Estudillo had suffered two intervening injuries. As the weight given to conflicting evidence is solely in the hands of the agency, we defer to the agency's determination. *See Arndt*, 728 N.W.2d at 394

Moreover, at the time of his injury, Estudillo was working in a "Grade 3" position earning $9.30 per hour. At the time of the workers' compensation hearing, he was performing a "Grade 1" job earning $10.75. A Grade 1 job is considered easier than a Grade 3 job. Had he continued in his Grade 3 position, Estudillo would have been earning $11.05 per hour at the time of the hearing. Thus, while working at a Grade 1 job pays slightly less than a Grade 3 job, Estudillo is still employed by IBP and earning more than before the 2000 injury.

Accordingly, we conclude the finding of ten percent industrial disability is supported by substantial evidence in the record and we have no reason to disturb it. We therefore affirm on this issue.

October 11 and 21, 2001 Injuries.

Estudillo next contends "the final agency decision erred in determining that [he] failed to prove that a fall from a stepladder on October 21, 2001 was related to his October 11, 2001 work injury." On this issue, the deputy commissioner, whose decision was adopted in whole by the commissioner, determined:

> The claimant did not sustain any temporary or permanent disability as a result of the October 11, 2001 work injury. The claimant has not proven that the fall on October 21, 2001 was related to the work injury on October 11, 2001.

Estudillo specifically asserts the shoe insert or support made necessary by the October 11 at-work incident caused the subsequent October 21 fall. As such, he asserts "[a]ny injury and subsequent disability associated with the fall is, therefore compensable." He requests that the final agency decision should be amended to award him benefits and include payments for the injuries sustained in the October 21 fall.

Workers' compensation covers "all personal injuries sustained by an employee arising out of and in the course of the employment . . ." *Dep't of Transp. v. Van Cannon,* 459 N.W.2d 900, 904 (Iowa Ct. App. 1990). Determining whether an injury or disease has a direct causal connection with the employment, or arose independently thereof, is essentially within the domain of expert testimony, and the weight to be given such an opinion is for the finder of the facts. *Id.*

We agree with the determination that Estudillo failed to prove the October 21 fall from the stepladder was related to or caused by his prior October 11 work injury. The record lacks any objective evidence that the fall resulted from his earlier injury. Dr. Neiman's report following an appointment with Estudillo on June 3, 2003 makes no mention that a shoe insert or support was a contributing factor to the fall. In fact, Dr. Neiman remarks "[t]his was not work related as far as I can tell." Accordingly, we affirm on this issue as well

Penalty Benefits.

Finally, Estudillo maintains the "final agency decision erred in determining that penalty benefits should not be assessed for non-payment of permanent partial disability benefits" relating to the October 16, 2000 injury. On this issue, the deputy found that, based on conflicting medical opinions, IBP's inquiry of whether his October 16, 2000 injury caused Estudillo permanent disability was reasonably investigated and whether he sustained any such disability was fairly debatable.

Iowa Code section 86.13 provides for penalties:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

A reasonable or probable cause or excuse exists if the delay was necessary for the insurer to investigate the claim or if the employer had a reasonable basis to contest the employee's entitlement to benefits. *Christensen v. Snap-On Tools Corp.,* 554 N.W.2d 254, 260 (Iowa 1996). If there is a good faith dispute over the employee's factual or legal entitlement to benefits, the claim is fairly debatable, and an award of penalty benefits is not appropriate under the statute. *Gilbert v. USF Holland, Inc.,* 637 N.W.2d 194, 199 (Iowa 2001). "Whether the issue was fairly debatable turns on whether there was a disputed factual issue that, if resolved in favor of the employer, would have supported the employer's denial of compensability." *Id.* However, the reasonableness of an employer's denial of benefits is not dependent upon whether the employer was ultimately right. *Keystone Nursing Care Ctr. v. Craddock,* 705 N.W.2d 299, 307-08 (Iowa 2005).

We conclude Estudillo's request for penalty benefits was properly denied. While it is true he was given permanent work restrictions, other evidence cast doubt as to the nature and extent of Estudillo's injuries. Dr. Minner provided a zero percent impairment rating, noting Estudillo "continued to have subjective symptoms which are vague [and] fairly inconstant . . . ." He further reasoned "I consider his examination to reveal moderate symptom magnification . . . . In addition, at times, he evidenced dramatic touch-me-not tenderness in the low back, which was at other times not present seemingly at all." Moreover, both Dr. Minner and Dr. Paul provided possible diagnoses of facet arthritis, a condition unrelated to any work accident. The agency concluded, and we agree, based on the medical information, the issue of whether Estudillo suffered permanent disability was fairly debatable. Hence, no penalty under Iowa Code section 86.13 was warranted.

Finding the decision of the agency supported by substantial evidence, we affirm.

AFFIRMED.