IN THE COURT OF APPEALS OF IOWA

No. 7-276 / 06-1430
Filed June 27, 2007

ROGER A. SHEBETKA,
Petitioner-Appellant/Cross-Appellee,

vs.

WORLEY WAREHOUSING, INC., Employer, and PACIFIC INDEMNITY COMPANY, sued as CHUBB PACIFIC INDEMNITY CO., Insurance Carrier,
Respondents-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Linn County, David L. Baker, Judge.

Petitioner appeals, and respondents cross-appeal, the district court decision affirming the workers' compensation commissioner's award of workers' compensation benefits. **AFFIRMED.**

Benjamin W. Blackstock of Blackstock Law Offices, Cedar Rapids, for appellant.

Stephanie L. Marett and Coreen K. Sweeney of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, for appellees.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ. Baker, J., takes no part.

ZIMMER, J.

Petitioner appeals and respondents cross-appeal from the district court decision affirming the workers' compensation commissioner's award of workers' compensation benefits. We affirm.

I. Background Facts and Proceedings.

Roger Shebetka was employed as a forklift driver for Worley Warehousing, Inc. Shebetka injured his back during the course of his employment on September 19, 2000.[1] He was given medical restrictions.[2] Shebetka's last day of work was January 3, 2001, because the employer did not have work he could do, based on his restrictions. He was discharged from his employment on May 4, 2001.

Shebetka was diagnosed with right lower extremity radiculopathy. Dr. Kevin Eck discussed with Shebetka a fusion at the L5-S1 level. After consulting with Dr. Daniel McGuire, however, Dr. Eck did not recommend surgery at that time. Shebetka fell twice during April 2003 because his right leg had become numb. A subsequent MRI showed foraminal narrowing at the L5-S1 level. Dr. Eck performed surgery at the L5-S1 level on December 5, 2003. Shebetka stated he continued to have back pain.

Shebetka was born in 1953. He has a high school degree and completed three semesters at the University of Iowa. Shebetka's work history includes jobs

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[1] Shebetka also injured his back on May 6, 1998; October 24, 1998; and April 26, 1999. He was able to return to work without restrictions after each incident.

[2] His restrictions were: he could lift forty-eight pounds occasionally, carry thirty-eight pounds occasionally, and push and pull fifty-four pounds occasionally. He could stand forty-five minutes with intermittent walking to relieve his symptoms and sit for a maximum of twenty minutes with breaks of five to ten minutes. Shebetka was unable to squat or lift from the floor to waste level.

in construction, machinist work, and sales. He began attending Kirkwood Community College in 2003, taking classes in parks and natural resources, and has a grade point average of 3.97. He expressed an interest in completing a college degree and a master's degree, then becoming an instructor. A vocational rehabilitation specialist, Debbie Girard, stated Shebetka could obtain a job in the field of sales or security. John Hughes, a vocational rehabilitation counselor, stated it was unlikely Shebetka could obtain a job in sales, but felt he could reach his goal of becoming a teacher.

Shebetka filed a claim for workers' compensation benefits, claiming he was entitled to benefits under the odd-lot doctrine. An administrative hearing was held on January 28, 2005. At the hearing the employer offered two videotapes of Shebetka performing yard work, dated April 28 and July 11, 2003. Shebetka objected on the ground there was insufficient foundation for the videotapes. The deputy workers' compensation commissioner ruled that the videotapes would be admitted "for what it's worth."

The deputy determined the surgery performed by Dr. Eck in December 2003 was not causally related to the work injury of September 19, 2000. The deputy found that Shebetka's falls in April 2003 broke the chain of causation. The deputy concluded the employer was not required to pay for Shebetka's medical treatment relating to the surgery. On the issue of the odd-lot doctrine, the deputy found:

> [I]t would appear that claimant is a highly motivated individual based on how well he is doing in his course work at Kirkwood at this time and, although this cannot be used in determining claimant's potential earning capacity, it appears that claimant would have the ability to pursue the degrees that he desires that will result

> in employment of a permanent and regular nature. However, it would also appear that claimant has abilities to perform certain types of work particularly in retail sales that would be available in the regular labor market. It is concluded, therefore, that claimant has not established that he is either an odd-lot employee or permanently and totally disabled.

The deputy concluded Shebetka had a seventy-percent industrial disability rating.

After the administrative hearing, Shebetka learned the deputy had called the employer's counsel about the videotapes, and he then filed an application for a rehearing, claiming there had been inappropriate ex parte communications. In ruling on the motion for rehearing, the deputy explained he had received only one videotape, had called the employer's counsel about this, and she sent the correct videotape. He stated, "This conversation concerned a procedural matter only and did not involve any discussion concerning any fact or law in the case." The motion for rehearing was denied, and he appealed.

The workers' compensation commissioner affirmed the deputy on all grounds, except the commissioner found the surgery of December 2003 and related medical treatment was causally related to the work injury. The commissioner found the falls in April 2003 resulted from ongoing right leg problems that were attributable to the work injury. Furthermore, Dr. Eck gave the opinion Shebetka's spinal degeneration and ultimate need for surgery were causally related to his work injury. On judicial review the district court affirmed the commissioner. Shebetka appealed, and the employer cross-appealed.

II. Standard of Review.

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

"It is the commissioner's duty as the trier of fact to . . . weigh the evidence, and decide the facts in issue." *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-95 (Iowa 2007). We may not "improperly weigh[ ] the evidence to overrule the commissioner's findings." *Id.*

III. Appeal.

A. Shebetka contends he established a prima facie case to show he comes within the 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 quality 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 to determine 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.

Roger asserts he established a prima facie case that he is unemployable. He claims the employer failed to show there were jobs available to him, based on his physical restrictions. He points to the opinion of Hughes that it was unlikely he could perform a job in sales. He also claims that speculative evidence of future employment based on his educational goals is not sufficient to meet the employer's burden.

We are bound by the commissioner's factual findings if they are supported by substantial evidence. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). We find there is substantial evidence in the record to support the commissioner's decision. Girard, a vocational rehabilitation counselor, testified Shebetka should be able to obtain employment in the fields of sales or sales management. She noted he had previous experience in sales and management. Shebetka's education shows he has the intelligence to do this type of work. The

commissioner was not required to accept the opinion of Hughes. *See IBP, Inc. v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001) (noting we give deference to the commissioner's findings of fact).

The commissioner did not rely on speculative evidence of future employment based on Shebetka's education. The commissioner noted Shebetka's education alone could not be used to determine his earning capacity. The commissioner also found "claimant has abilities to perform certain types of work particularly in retail sales that would be available in the regular labor market." The commissioner properly considered Shebetka's education as one of the factors to be considered in determining whether he presented a prima facie case he came within the odd-lot doctrine. *See Nelson*, 544 N.W.2d at 268 (noting factors to consider are age, education, training, intelligence and physical impairment).

B. Shebetka claims the deputy abused his discretion by admitting the videotapes into evidence when there was an insufficient foundational basis for the videotapes. Iowa Code section 17A.14(1) (2005) provides:

> A finding shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial.

Under section 17A.14(1), administrative agencies are not bound by the technical rules of evidence. *Hy-Vee, Inc. v. Employment Appeal Bd.*, 710 N.W.2d 1, 4 (Iowa 2005); *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). The agency's fact finder may base its decision upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not

immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995). It is reversible error for an administrative agency to refuse to admit evidence allowed by statute. *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 608 (Iowa Ct. App. 1990).

We conclude the deputy did not err by admitting the videotapes into evidence. Reasonably prudent persons would rely on the videotapes for the conduct of their serious affairs. The videotapes were referred to in Dr. Eck's deposition and helped explain his deposition testimony. Also, Shebetka and his wife were able to testify concerning his actions on the videotapes.

Shebetka additionally claims the deputy engaged in improper ex parte communication with the employer's counsel. Under section 17A.17(1), a presiding officer should not communicate ex parte with a party about any issue of fact or law in a case. The deputy explained his telephone call to the employer's counsel in the ruling on the motion for rehearing. No issues of fact or law were discussed during the telephone call. Two videotapes were admitted during the hearing, and the deputy merely sought to straighten out the mix-up that occurred when he had only one of the videotapes after the hearing. We determine there was no improper ex parte communication in this case.

IV. Cross-Appeal.

In this cross-appeal, the employer asserts there is not substantial evidence in the record to support the commissioner's finding that the December

2003 surgery and related medical expenses were causally related to Shebetka's work injury.

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.2d at 218. Evidence is substantial when a reasonable person would accept it as adequate to reach the same finding. *Asmus v. Waterloo Cmty. Sch. 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.

We determine there is substantial evidence in the record to support the commissioner's decision. The commissioner discussed his conclusions as follows:

> Claimant suffered falls at home in early April 2003. Claimant contends that the falls resulted from his ongoing right leg problems, including increasing episodes of numbness which he attributes to his work injuries. He contemporaneously reported these increasing right leg problems to his physical therapist prior to his return to Dr. Eck. Dr. Eck has opined the claimant's increase in symptoms in spring 2003 was the result of the natural progression of his degenerative disc disease. In his deposition, however, Dr. Eck clarified his opinion by further stating that claimant's spinal degeneration and his ultimate need for surgery were causally related to the work injuries. Hence, the surgery and other related medical care, . . . were treatment that the work injuries made necessary. The costs are defendant's liability.

Substantial evidence supports the commissioner's finding that Shebetka's medical condition that led to surgery was causally related to his work injury.

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

AFFIRMED.