IN THE COURT OF APPEALS OF IOWA

No. 7-371 / 06-1800
Filed October 24, 2007

TERRY ORRIS,
Petitioner-Appellant,

vs.

KINZE MANUFACTURING, INC., and FEDERATED INSURANCE,
Respondents-Appellees.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla, Judge.

Terry Orris appeals from the denial of his petition for judicial review. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Matthew Dake and Thomas Wertz of the Wertz Law Firm, P.C., Cedar Rapids, for appellant.

Brian Yung of the Klass Law Firm, L.L.P., Sioux City, for appellees.

Considered by Sackett, C.J., and Huitink and Vogel, JJ.

VOGEL, J.

Workers' compensation claimant Terry Orris appeals from the denial of his petition for judicial review. The commissioner determined Orris was not an odd-lot employee, and the district court affirmed this ruling. We affirm that decision, but reverse in part on the issue of penalty benefits and remand.

Background Facts and Proceedings.

On May 16, 2001, while working at Kinze Manufacturing, Inc., Orris was seriously injured when a nearly 300-pound wheel rim came off a lift and struck him in the face and legs. After transport to the University of Iowa Hospitals and Clinics, he was diagnosed with, among other things, bilateral nose bone fractures and a nasal septum fracture. He was hospitalized and surgery was performed two days later. Soon after the incident, Orris began experiencing debilitating headaches that reportedly occurred approximately once per week.

On December 14, 2001, Orris was returned to work with light duty restrictions of four hours per day and a twenty-pound lifting restriction. However, due to his headache complaints, he was taken off work in March of 2002, but returned in November of 2002 with his only restriction being no work in loud noise areas. Following a June 2003 meeting between Orris and his Kinze employers during which they discussed possible accommodations that would allow his continued employment, the parties mutually agreed to terminate his employment.

Following this termination, Orris was unemployed for six months. He then began working as an independent contractor, installing cable for Logan Communications, a firm owned by friends of Orris. This work requires travel

throughout the United States, but allows Orris flexibility to turn down or extend jobs depending on his headache pain. If Logan's business continues to grow as anticipated, Orris anticipates he can earn in the range of $40,000 per year in this position within the next couple of years.

On November 6, 2003, Orris filed a workers' compensation petition against Kinze and its insurance carrier. Following a hearing, the deputy workers' compensation commissioner issued an arbitration decision in which he concluded Orris sustained a twenty-five percent permanent partial industrial disability due to his need to avoid noise exposure. He denied Orris's request for an award of penalty benefits. Orris appealed to the workers' compensation commissioner, who affirmed the deputy's decision on all issues except adding recovery on a claim for medical benefits. The district court affirmed the agency action and Orris appeals.

Standard of Review.

Our review is governed by the Iowa Administrative Procedure Act. Iowa Code ch. 17A (2005); *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.* We shall reverse if the ruling in question prejudices the substantial rights of a party and is

based "on an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(10)(c).

Odd-Lot Doctrine.

Orris generally contends the "court erred in finding [he] did not establish a prima facie odd-lot case" and that a determination of total disability is warranted on the record. While largely adopting the decision of the deputy which rejected these claims, the commissioner did add the following on this issue:

> I do not find any evidence that purports to be a prima facie showing of total disability to be credible. The fact that claimant continued to be employed in the competitive labor market on the date of the hearing is strong evidence that he is not totally disabled and would effectively rebut any purported showing of total disability that might arguably trigger 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 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.

We first conclude the agency did not commit error in applying a wrong legal analysis regarding the odd-lot doctrine. *See* Iowa Code § 17A.19(10)(c). As noted, the first step in this analysis is to determine whether Orris made a prima facie case of total disability "by producing substantial evidence that [he] is not employable in the competitive labor market." *Guyton*, 373 N.W.2d at 106. Only if that prima facie case is made, does the burden shift to the employer. Here, the commissioner started his analysis by determining Orris had not made that required prima facie showing because, "claimant continued to be employed in the competitive labor market." By this finding, its odd-lot analysis necessarily was at an end and it need not have gone any further.

We further conclude substantial evidence supports the commissioner's determination that Orris is not an odd-lot employee. *See* Iowa Code § 17A.19(10)(f). Here, Orris is employed in a position in which he expects to earn approximately $40,000 per year within a short period of time. His own testimony reflected his present ability to earn a living. *See Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 617 (Iowa 1995). This position requires him to travel to different locations throughout the United States and uses power tools in order to install cable in hotels. This is not a situation whereby Orris could only be employed by friends sympathetic to his frequent headaches. Rather the evidence supports that Orris has various job skills and is not "incapable of obtaining employment in any well-known branch of the labor market." *See Michael Eberhart Constr.*, 674 N.W.2d at 125.

In addition, there was substantial evidence that Orris was not totally disabled, and that he was capable of more demanding work. For example, Dr. Charles Buck opined that Orris "is able to perform normal manufacturing activities," but that his "recovery may be aggravated by his attitude toward his injury [because] [h]e is angry about the injury, income loss, disability and his belief that the injury should have been prevented." Also, as we have noted, a claimant's intelligence, education, training, and ability to be retrained are factors to consider. *Nelson*, 544 N.W.2d at 267. The deputy considered Orris's varied work history and resume reflecting his ability to work in any number of positions that would fit within his work restrictions.

Finally, the deputy commissioner, whose decision the commissioner largely adopted, found Orris's credibility to be lacking. Stressing that Orris's complaints were almost totally of a subjective nature, the deputy stated

> The credibility of the claimant is perhaps even more important in a determination of industrial disability herein than in the average case. And the claimant's credibility is suspect. His demeanor at hearing was below average. His facial expressions were at times inappropriate. His answers at times provided less than the whole truth and had to be expanded via multiple questions on cross-examination for a complete picture to appear.

We give deference to credibility determinations made by the agency. *Clark v. Iowa Dep't of Revenue & Fin.*, 644 N.W.2d 310, 315 (Iowa 2002). We also concur in the assessment that credibility is a key factor in determining the level of industrial disability in this case in which subjective complaints are the primary method of proving that disability. We affirm the commissioner's determination that Orris is not totally disabled, and thus, that the odd-lot doctrine is not triggered.

Penalty Benefits.

Orris maintains he submitted three separate and distinct grounds with respect to the assessment of penalties: Kinze's failure to (1) provide proper notice; (2) timely pay benefits; and (3) pay an amount that reasonably reflects his loss of earning capacity. He faults the commissioner and district court for only ruling on the later ground. We conclude the agency correctly denied Orris penalty benefits on grounds (1) and (3), but that it erred in failing to explain why penalty benefits should not be awarded based on the late payments of several weekly benefits.

First, no penalty was appropriate based upon the amount of industrial disability voluntarily paid. Although the agency eventually found Orris to have a twenty-five percent industrial disability, Kinze had voluntarily paid temporary total and later permanent partial disability payments calculated on a fifteen percent body as a whole disability. Those payments were reasonable given the twelve percent whole body impairment rating given by Dr. Buck. Furthermore, the subjective nature of Orris's headache complaints lent themselves to uncertainty as to the appropriate level of industrial disability. *See Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 396 (Iowa 2001) (stating a reasonable basis for denying insurance benefits exists if the claim is "fairly debatable").

Second, Orris was not entitled to penalty benefits based on any inadequacy of the notices provided. *Auxier v. Woodward State Hospital-School*, 266 N.W.2d 139, 142 (Iowa 1978), clarified that workers' compensation claimants are entitled to notice which, among other things, states the contemplated time of the termination of benefits, which shall occur not less than thirty days following the notice, and that the claimant has the right to contest this proposed action. Kinze asserts that the November 2, 2002 notice, of which Orris complains, did not terminate benefits, and the December 16, 2003 notice, of which he also complains, advised Orris he would be receiving an additional period of benefits from that previously offered. As such, Kinze argues they were not "*Auxier* notices." Regardless of how they were formally designated, these notices did provide Orris with knowledge his benefits would terminate with greater than thirty days of advance notice. Moreover, Orris had already filed his workers'

compensation petition with the commissioner prior to the time of the December 2003 notice. Accordingly, no penalty was warranted on this ground.

However, we do conclude some measure of penalty benefit should have been addressed based on the possible untimeliness of several payments. An employee "is entitled to penalty benefits if there has been a delay in payment unless the employer provides a reasonable cause or excuse." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 469 (Iowa 2004). In the absence of a reasonable excuse for a delay, penalty benefits are mandatory. *Christensen v. Snap-On Tools Corp.,* 554 N.W.2d 254, 261 (Iowa 1996). Weekly compensation payments are due at the end of the compensation week, *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 235 (Iowa 1996), and are "made" when mailed or personally delivered to the claimant. *Meyers v. Holiday Express Corp.*, 557 N.W.2d 502, 504 (Iowa 1996). If a weekly benefit payment is not made on or before its due date, a penalty will be imposed pursuant to Iowa Code section 86.13 unless the employer provides a reasonable excuse for failing to do so and "conveys that reason to the employee contemporaneously with the beginning of the delay." *Id*.

Here, Kinze's record of payments indicates seven payments were not made in a timely fashion. Because Kinze has not offered an excuse and can only state on appeal that the payments were made "at *or near* the time benefits were to be paid," we conclude the issue must be remanded to the agency to determine and specifically address whether some measure of penalty benefits is mandated. *See Christensen*, 554 N.W.2d at 261. We therefore reverse on this limited issue, and remand to the agency for proper findings as to the due date of

each payment, the date each payment was made, and a determination of the amount of the penalty, if any, consistent with such findings.

Sufficiency of Agency's Explanation.

Finally, Orris asserts that the commissioner's determination that he suffered a twenty-five percent disability is not sufficiently explained so as to allow for adequate judicial review. "While it is true that the commissioner's decision must be sufficiently detailed to show the path he has taken through conflicting evidence, the law does not require the commissioner to discuss each and every fact in the record and explain why or why not he has rejected it." *Terwilliger v. Snap-On Tools*, 529 N.W.2d 267, 274 (Iowa 1995) (internal quotations and citation omitted). We conclude the agency decision contains at least minimally sufficient detail and adequately provides the basis for its outcome.

Costs of this matter are assessed two-thirds to Orris and one-third to Kinze.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.