IN THE COURT OF APPEALS OF IOWA

No. 9-452 / 08-1714
Filed October 7, 2009

EVERADO LOPEZ,
Plaintiff-Appellant/Cross-Appellee,

vs.

MIDSTATES HORSE SHOWS, INC.,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Artis I. Reis, Judge.

The plaintiff appeals and the defendant cross-appeals from the district court's ruling on judicial review affirming the workers' compensation decision. **AFFIRMED.**

Gary G. Mattson of LaMarca & Landry, P.C., Des Moines, for appellant.

Rustin T. Davenport of De Vries, Price & Davenport, Mason City, for appellee.

Heard by Vogel, P.J., Potterfield, J. and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

Everado Lopez appeals and Midstates Horse Shows, Inc. cross-appeals from the district court's ruling on judicial review affirming the workers' compensation commissioner's decision. We affirm.

I. Background Facts and Proceedings.

Kristin Rame is the president and sole shareholder of Midstates Horse Shows, Inc. (Midstates). Rame, a professional horse rider and trainer, incorporated Midstates in 1985. Midstates organizes and produces approximately five horse shows a year in Iowa and Minnesota, as well as renting equipment and contracting services to other events. When producing a horse show, Midstates utilizes several different types of workers, including announcers, blacksmiths, course designers, judges, people to set up and tear down equipment, secretaries, security, and veterinarians.

In 2001, Lopez turned sixty-five and began receiving Social Security retirement benefits. He also learned of Midstates through a long-time friend, Peter Booth, who worked at horse shows produced by Midstates and other companies. When working for Midstates, Booth performed various tasks, including carpentry, the set up and tear down of the horse stalls and show equipment, and running gates and rings for the shows. On the recommendation of Booth, Lopez began working at horse shows doing security work and assisting with the set up and tear down of equipment.

Lopez described himself as semi-retired. He worked several horse shows a year, each with one to three weeks duration. He did not work for all of Midstates's horse shows and in 2003 he also worked for Alpine Farms, Inc. at

two of its horse shows. Lopez was paid $800 by Midstates in 2002; $7642.50 by Midstates and $1687.50 by Alpine Farms, Inc. in 2003; and $2000 by Midstates in 2004.

On June 5, 2004, Lopez was setting up portable metal stalls for Midstates when he was injured. Twenty-four metal panels, weighing approximately 600-700 pounds, fell on top of him. Lopez was taken to the local hospital by emergency medical services and was then transported to Hennepin County Medical Center by air ambulance. Lopez sustained multiple trauma injuries, including injuries to his head, left and right clavicle, rib fractures, and a pelvic fracture. He required surgery on his right clavicle and pelvic fractures.

After an August 2006 hearing on Lopez's petition, the deputy commissioner filed an arbitration decision finding that (1) Lopez was an employee of Midstates at the time of his injury; (2) Lopez's injury arose out of and in the course of his employment with Midstates; (3) Lopez was permanently and totally disabled; and (4) Lopez was entitled to a compensation rate of $459.58 per week. In calculating Lopez's weekly rate of compensation, the deputy discussed that Lopez was a full-time intermittent employee but did not work thirteen consecutive calendar weeks prior to June 5, 2004. Therefore, the deputy found that "Iowa Code section [85.36(9)] would be a logical and appropriate way to determine claimant's actual earnings," but was difficult to apply and instead determined Lopez's gross earnings by applying an averaging test. *See Hanigan v. Hedstrom Concrete Prods., Inc.*, 524 N.W.2d 158 (Iowa 1994) (discussing the averaging test).

On intra-agency appeal, the commissioner adopted the deputy's proposed arbitration decision except modified and reduced the rate of weekly compensation. The commissioner found that "awarding a compensation rate that is over twice claimant's annual earnings from employment since his retirement prior to this work injury is excessive. . . . [T]he best approximation of the claimant's customary earning from employment is . . . pursuant to Iowa Code section 85.36(9)." The commissioner awarded Lopez a compensation rate of $164.41 per week.

On March 5, 2008, Lopez petitioned for judicial review asserting that the commissioner erred in calculating Lopez's weekly rate of compensation pursuant to Iowa Code section 85.36(9). Midstates cross-petitioned for judicial review asserting that (1) the commissioner's finding that Lopez was an employee of Midstates was not supported by substantial evidence; (2) the commissioner's finding that Lopez was permanently totally disabled was not supported by substantial evidence; and (3) the commissioner's calculation of the weekly rate of compensation was incorrect. The district court found that (1) the commissioner's finding that Lopez was an employee of Midstates was supported by substantial evidence and the application of law to those fact findings was not irrational, illogical, or wholly unjustifiable; (2) the commissioner's finding that Lopez was permanently totally disabled was supported by substantial evidence; (3) there was no error in the commissioner's use of Iowa Code section 85.36(9) to calculate Lopez's weekly rate of compensation; and (4) Midstates's argument that the commissioner's math appears to be incorrect was not preserved. Lopez appeals and Midstates cross appeals.

II. Standard of Review.

The Iowa Administrative Procedure Act governs judicial review of the commissioner's decisions. Iowa Code § 86.26 (2007). Iowa Code section 17A.19 lists the instances when a court may, on judicial review, reverse, modify, or grant other appropriate relief from agency action. We do not apply a "scrutinizing analysis" to the commissioner's findings. *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 272 (Iowa 1995). Rather, we are bound by the agency's findings of fact if supported in the record as a whole and will reverse only if we determine substantial evidence does not support the agency's findings. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). The question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made. *Id*.

Unlike the commissioner's findings of fact, "we give the commissioner's interpretation of the law no deference and are free to substitute our own judgment." *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007). "On the other hand, application of the workers' compensation law to the facts as found by the commissioner is clearly vested in the commissioner" and may be reversed "only if it is irrational, illogical, or wholly unjustifiable." *Id*.

When we review the district court's decision, "we apply the standards of chapter 17A to determine whether the conclusions we reach are the same as those of the district court. If they are the same, we affirm; otherwise, we reverse." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464 (Iowa 2004).

III. Analysis.

A. Employee-Employer Relationship.

Midstates first argues that Lopez was not an employee, but rather an independent contractor. In order for our workers' compensation statues to provide coverage, the claimant and the respondent must have an employer-employee relationship at the time of the injury. *Meyer*, 710 N.W.2d at 220, 221. An independent contractor is not an employee and thus, is not covered by the workers' compensation statutes. *See* Iowa Code § 85.61 (2005); *Mermigis v. Servicemaster Indus.*, 437 N.W.2d 242, 245 (Iowa 1989).

"When the issue is whether an individual is an employee or an independent contractor, many factors are relevant." *Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 542 (Iowa 1997). In determining whether there is an employer-employee relationship, we consider the following five factors:

> (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) the identity of the employer as the authority in charge of the work or for whose benefit it is performed.

Id. Further, in determining whether a worker is an employee or independent contractor, we consider the following eight factors:

> (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants, with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.

Id. at 543. "And, in every case where the issue was whether the person was an employee or an independent contractor, the court weighs the parties' intention as it reflected upon the employment relationship." *Id*. at 543. Although "the primary focus is on the extent of control by the employer over the details of the alleged employee's work," no one factor is controlling. *Id*. at 542; *D & C Express, Inc.*, *v. Sperry*, 450 N.W.2d 842, 844 (Iowa 1990).

In the present case, Lopez worked at some of Midstates's horse shows, but not all of them. Midstates provided Lopez with a list of the horse shows and he would indicate at which ones he planned on working. Lopez did not work exclusively for Midstates; he could work for other horse shows and worked at two horse shows produced by Alpine Farms, Inc. in 2003. Additionally, Midstates was hired by the Minnesota Hunter Jumper Association to be the manager of its horse shows in 2003 and 2004. Lopez worked at these two shows and was considered to be an independent contractor and paid directly by the Minnesota Hunter Jumper Association.

When he worked at a Midstates's horse show, Lopez would assist in setting up the equipment for approximately three days before the show began. During the show, he worked security as a night watchman from 7:00 p.m. to 7:00 a.m. After the show ended, he assisted in tearing down the equipment for approximately one and one-half days. Lopez testified that he was also asked to perform other duties, such as water the plants and drive Rame and other judges to the airport. He was paid a daily rate and Midstates gave him a check at the end of the show for each day he worked.

Lopez testified that Midstates did not provide him with any tools for either the security work or the set up and tear down of equipment. He provided his own screwdriver and pair of pliers for doing the set up and tear down, and his uniform and flashlight for performing the security work. However, he testified that he used his own tools because "half the time you went to the office, where the tools were, and you couldn't find them there." Rame testified that Midstates does not have any tools. She also testified that she did not supervise Lopez while he was providing security work for the horse shows and did not give him specific hours. However, she stated that she needed security to patrol the area and gave a detailed description of her expectations for the job.

Lopez testified that he considered himself as an employee of Midstates. However, Rame testified that she considered Lopez as an independent contractor. She characterized all of the workers at horse shows as independent contractors. However, some workers were paid daily and some were paid a flat amount for working a show.

For the compensation he received in 2002 and 2003 from Midstates, Lopez was given a 1099 income tax form that reported the payments as "nonemployee compensation." However, for the compensation he received in 2003 from Alpine Farms, Inc., Lopez was given a W-2 income tax form that reported the payments as wages, with corresponding withholdings.

"It was [Lopez's] burden to establish the existence of an employer-employee relationship at the time he was injured." *D & C Express*, 450 N.W.2d at 844. On this record, there were indicia of both an employee and independent contractor relationship. The finding of fact is the commissioner's duty and "[o]ur

inquiry is strictly limited to determining whether a contrary factual finding is demanded as a matter of law." *Id*. We agree with the district court that there was substantial evidence to support the commissioner's factual findings and his conclusion that Lopez was an employee of Midstates was not irrational, illogical, or wholly unjustifiable. *See Lakeside Casino*, 743 N.W.2d at 173 (stating application of law to the facts as found by the commissioner may be reversed "only if it is irrational, illogical, or wholly unjustifiable").

B. Permanent Total Disability.

Midstates next argues that the commissioner's finding that Lopez suffered permanent total disability is not supported by substantial evidence. Total disability does not require a state of absolute helplessness. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 633 (Iowa 2000). "Such disability occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to perform." *Id*.

In the present case, the agency finding was that at the time of the hearing, Lopez was seventy-years old. He had obtained a GED and was certified in heating and air conditioning as well as private investigation. His work experience was varied as both a skilled and unskilled manual laborer. The arbitration decision adopted by the commissioner stated,

> On June 5, 2004, Lopez was involved in a serious accident that resulted in a permanent disability to his pelvis, right clavicle, and left leg. Dr. Stoken rated Lopez's combined whole body impairment (the only rating in the record) as thirty-eight percent. Dr. Stoken's opinion that claimant was unable to work because of his chronic pain is uncontradicted in the record. Claimant had surgery on both his pelvis and his right clavicle. He walks only with the use of a

> cane or a walker . . . . Given the severity of claimant's disabilities, his current physical condition, and Dr. Stoken's opinion that claimant was unable to work, it is hard to imagine any job that claimant could do given his experience, training, and education. Claimant is permanently and totally disabled.

Dr. Jacqueline M. Stoken performed an independent medical examination and issued a report dated June 15, 2006. The report stated that as a result of the injuries, Lopez suffered from impaired mobility and gait and chronic pain syndrome. Lopez had reached maximum medical improvement and had a whole person impairment of thirty-eight percent. Additionally, due to his chronic pain, Lopez was unable to work at that time. Lopez testified that he still requires daily pain medication and had pain in his right shoulder, pelvis, and leg. He uses a prescribed left knee brace and a TENS unit to manage pain and walks with either a cane or walker.

The evidence, including the medical evidence, is uncontested. Rather, Midstates argues the commissioner did not give enough weight to Lopez's "demonstrated skills" and "semi-retired status." However, the commissioner clearly considered the appropriate factors, including Lopez's age, education, prior work experience, and his ability to engage in this type of employment. The fact that Lopez was semi-retired is considered in calculating the amount of his benefits, not whether he had an ability to work at all. *Compare* Iowa Code § 85.36 (basing the computation of benefits on the amount an employee historically earned), *with IBP, Inc.*, 604 N.W.2d at 633 (discussing that permanent total disability is based upon what type of work the employee would have been able to perform absent the injury). We agree with the district court and find

substantial evidence supports the commissioner's finding of permanent total disability.

C. Calculation of Benefits.

Lopez argues that the commissioner erred by applying Iowa Code section 85.36(9) to calculate his weekly rate of compensation. Section 85.36 sets forth the basis of computation for a claimant's weekly rate of compensation. Subsection (9) provides:

> If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

Iowa Code § 85.36(9); *see also King v. City of Mt. Pleasant*, 474 N.W.2d 564, 566 (Iowa 1991) (stating that prior to applying subsection (9), "there must be a preliminary finding that the employee 'either earns no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality'"). The commissioner concluded that this subsection was the best method to approximate and calculate the claimant's customary earnings from employment.

Lopez argues that the commissioner did not make a preliminary factual finding that he earned less wages than the "usual weekly earnings of a regular full-time laborer" and therefore, the commissioner cannot apply subsection (9) to determine his weekly rate of compensation. He further argues that the district court erred in "cit[ing] the Commissioner's 'factual finding' that Lopez's salary was less than a full time worker . . . this factual finding did not take place."

The commissioner stated, "Claimant demonstrated that he had no desire to return to work after his retirement at age sixty-five and described himself as semi-retired. . . . [A] semi-retired worker would earn less than a person who is available full-time." We find this is a sufficient factual finding that Lopez would earn less than the usual weekly earnings of a regular full-time laborer and there was no error in applying subsection (9) to determine Lopez's weekly rate of compensation; there was no error by the district court in citing the commissioner's findings.

Additionally, Lopez argues that rather than applying section 85.36(9), the commissioner should have applied an averaging test. *See* Iowa Code § 85.36(7) (2007); *Hanigan v. Hedstrom Concrete Prod., Inc.*, 524 N.W.2d 158 (Iowa 1994). The commissioner found that the averaging test would result in

> awarding a compensation rate that is over twice claimant's annual earnings from employment since his retirement prior to his work injury is excessive. . . . Claimant demonstrated that he had no desire to return to full-time work after his retirement at age sixty-five and described himself as semi-retired.

Workers' compensation statutes are "meant to be applied, not mechanically nor technically, but flexibly, with a view always to achieving the ultimate objective of reflecting fairly the claimant's probable future earning loss." Lopez does not fit perfectly into a category, but the application of section 85.36(9) was the closest reflection of Lopez's income for the prior year and future earning loss. We find the commissioner did not err in applying section 85.36(9) (2005), rather than an averaging test.

Finally, Midstates argues that in calculating Lopez's weekly rate of compensation under section 85.36(9), the commissioner incorrectly included

$2000 of wages. However, Midstates failed to raise this issue before the commissioner. "In workers' compensation cases appellate review is limited to those matters raised and litigated before the commissioner." *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 184 (Iowa 1980). We agree with the district court that because the issue was not raised and litigated before the commissioner, we lack authority to review the issue.

IV. Conclusion.

Upon our review, we find there was substantial evidence to support the commissioner's factual findings regarding the employer-employee relationship and the commissioner's conclusion that Lopez was an employee of Midstates was not irrational, illogical, or wholly unjustifiable. Additionally, we find substantial evidence supported the commissioner's finding that Lopez suffered permanent total disability. In calculating Lopez's weekly rate of compensation, we find the commissioner correctly applied Iowa Code section 85.36(9). Finally, Midstates's argument regarding a mathematical calculation was not preserved. We have considered all of the arguments on appeal and affirm the district court.

AFFIRMED.