IN THE COURT OF APPEALS OF IOWA

No. 7-589 / 06-1371
Filed January 16, 2008

PELLA CORPORATION,
Petitioner-Appellant,

vs.

GARY HALL,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Leo Oxberger, Judge.

Pella Corporation appeals following the ruling on judicial review of Gary Hall's workers' compensation action. **AFFIRMED.**

David Jenkins of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellant.

Laura Pattermann of Gallner & Pattermann, P.C., Council Bluffs, for appellee.

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

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

VOGEL, P.J.

Pella Corporation appeals following the ruling on judicial review of Gary Hall's workers' compensation action. We affirm.

Background Facts and Proceedings.

In 1992, Pella hired Hall, who performed various duties, including running a band saw, a splitter saw, and a planer and working in the molder operation area. On February 7, 2001, while pushing a cart stacked with wood, Hall felt a pop in his neck and by the next day was unable to raise his left arm above shoulder level. An MRI indicated degenerative disc disease and a subsequent CT scan revealed compression of the nerve root at the C6 and C7 levels. On April 26, 2001, Hall underwent a cervical fusion at the C5-6 and C6-7 levels.

Hall initially experienced a relief of his symptoms and he returned to work in June of 2001. However, a failure of bone growth at the fusion site, likely caused by Hall's continued smoking, lead to continued neck pain. Hall then underwent a revision of the cervical fusion in July of 2002. In September, he returned to work on light duty for half days while receiving temporary partial disability benefits. On September 30, 2002, Hall injured his lower back while bending over to pick up a piece of wood, causing pain to radiate down his left leg. An MRI indicated he had suffered a herniated disc at the L5-S1 level. On December 17, 2002, Hall underwent surgery to correct the problem. On January 3, 2003, Hall's surgeon, Dr. Ric E. Jensen, opined Hall had reached maximum medical improvement. After being cleared, Hall returned to work on March 10, 2003, with restrictions of four-hour days and lifting no more than thirty pounds. Upon his return, Hall claimed the neck, shoulder, low back, and leg pain

persisted. Because he allegedly could not tolerate the pain, Hall left Pella's employment in early April, 2003.

On April 2, 2003, Hall filed two workers' compensation petitions seeking benefits in connection with the injuries of February 7, 2001, and September 30, 2002. In an arbitration decision, the deputy commissioner found Hall to be permanently and totally disabled and entitled to certain medical expenses. On appeal from this decision, the industrial commissioner affirmed. The district court affirmed on judicial review. Pella Corporation appeals from this ruling, contending (1) the court erred in affirming that Hall is permanently and totally disabled from the two injuries, and (2) Hall received an improper double recovery.

Scope and Standards of Review.

Review of agency actions is limited to correcting errors at law. Iowa R. App. P. 6.4. In reviewing the district court's decision, we apply the standards of Iowa Code chapter 17A (2007) to determine whether our conclusions are the same as those of the district court. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002). If they are the same, we affirm; if not, we reverse. *Id.*

In reviewing the agency's factual determinations regarding the total disability finding, we look to see whether those determinations are supported by substantial evidence. Iowa Code § 17A.19(10)(f). This requires that the entirety of the record -- including supporting and detracting relevant evidence as well as credibility assessments -- be sufficient to allow a reasonable and neutral person to reach the same conclusion as the agency. *Id.* We broadly

and liberally apply the agency's findings to uphold rather than to defeat its decision. *IBP v. Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000).

The interpretation of the apportionment statute has not "clearly been vested by a provision of law in the discretion of the agency." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464 (Iowa 2004); Iowa Code § 17A.19(10)(c). We therefore need not give the agency any deference regarding its interpretation and are free to substitute our judgment de novo for the agency's interpretation. *See* Iowa Code § 17A.19(10)(c), (11)(b); *see also Mosher v. Dep't of Inspections & Appeals*, 671 N.W.2d 501, 508-10 (Iowa 2003).

Permanent Total Disability.

The arbitration decision, which was fully adopted by the commissioner, found Hall "is not employable in the competitive labor market" and that he is, therefore, entitled to a finding of permanent total disability. *See Guyton v. Irving Jenson, Co.*, 373 N.W.2d 101, 105 (Iowa 1985) (recognizing the "odd-lot" doctrine, under which a worker is considered totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist"). It based this determination on a variety of factors, including Hall's age, education, job history, work restrictions, functional impairment ratings, and unavailability of other employment for which Hall would be qualified. Pella claims this finding of total disability, stemming from the two injuries, is in error.

Industrial disability is measured by the employee's loss of earning capacity. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993). The focus is on the employee's present ability to earn in the competitive market.

Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). "An odd-lot employee is one who is incapable of finding work in any established branch of the labor market." *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 267 (Iowa 1996). The worker is considered totally disabled because a lack of steady employment precludes any material earning capacity. *Id.* "The question is whether [the] work-related injury has 'wholly disable[d] [Hall] from performing work that [his] experience, training, intelligence, and physical capacities would otherwise permit [him] to perform.'" *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 501 (Iowa 2003) (quoting *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 633 (Iowa 2000)). The pertinent question is whether "there [are] jobs in the community that the employee can do for which the employee can realistically compete." *Second Injury Fund v. Shank*, 516 N.W.2d 808, 815 (Iowa 1994).

On appeal, Pella does not appear to dispute the ultimate determination that Hall is totally disabled as an odd-lot employee. Rather, it claims the disability came about due to a "new, nonwork-related condition" and that, therefore, the "evidence in the record does not support a conclusion that the alleged injuries at issue [that occurred on February 7, 2001, and September 30, 2002] resulted in Hall being permanently and totally disabled."

On February 27, 2003, Dr. Jensen indicated Hall could return to work on March 10, 2003, with restrictions. However, on March 19, 2003, after his return to work, but before his final day of work, Hall was examined again by Dr. Jensen. During that appointment, Hall complained of pain in the thigh of the *right* leg, although prior to this time, he had professed primarily *left* leg complaints. Dr. Jensen's notations include that Hall "returns now for routine follow up

complaining of mechanical low back pain and bilateral groin/anterolateral thigh pain (right greater than left) . . . . He has no recurrence of his radicular left leg pain and his lumbar discectomy procedure thusly appears to be highly successful." After another examination on June 4, 2003, Dr. Jensen wrote that the right leg pain had worsened, but that Hall reports "excellent, if not complete resolution of his radicular left leg pain . . . describes only mild low back pain, [and] his paracervical pain syndrome is largely resolved." In a March 25, 2004 letter, Dr. Jensen informed Pella of his opinion that the right leg issue resulted from a "degenerative [problem and is] not causally related to workplace activities per se." It is due to this sequence of opinions that Pella asserts the total disability was not caused by either of the indisputable work-related injuries, as they both had been successfully resolved prior to the onset of the right leg problems.

However, in a letter of September 18, 2003, Dr. Jensen gave impairment ratings of sixteen and fourteen percent for Hall's cervical and lumbar spine issues. These clearly stem from the work-related injuries for which Hall had surgery. Totaling the two figures, Dr. Jensen gave Hall a "permanent partial impairment rating of the whole person . . . at 30%." He then placed Hall on permanent activity restriction of light duty.

The district court determined these ratings and restrictions, upon which the total disability finding ultimately was made, were arrived at without consideration of the most recent complaints of nonwork-related pain in the right leg. In a June 25, 2004 letter, Dr. Jensen stated this new condition "was not considered in the above data." Thus, his impairment rating did not include these

new symptoms. In addition, at the hearing before the deputy commissioner, Hall testified, "I still get the pain down both legs," and at the time he left Pella's employ, "I was having pain in the lower back up the shoulder area."

Therefore, we agree that substantial evidence supports a finding that Hall has a thirty percent permanent functional impairment of his body due to the two compensable injuries to his cervical and lumbar spine. In addition to that impairment rating, a variety of factors led to the agency's industrial disability finding. For example, at the time of the judicial review hearing, Hall was fifty-five years old. He only had a seventh-grade education. He had limited transferrable job skills. He had been placed on fairly stringent physical restrictions by his physician. According to vocational expert Gail Leonhardt, due to injuries and restrictions, Hall suffered a loss of earning capacity of forty-five to fifty-five percent, and had lost access to ninety-six percent of his labor base. Based on these factors, we conclude substantial evidence supports that Hall is permanently and totally disabled as a result of the two work-related injuries.

Pella next claims that Hall's untruthfulness in his job application[1] should have caused the fact finder to reduce the overall assessment of Hall's veracity. It argues the agency failed to evaluate the "validity of Hall's subjective complaints in light of such a significant untruthful statement." We have often said it is the role of the agency to determine the credibility of witnesses and the weight to be given to any evidence. *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). We are not inclined to hold the commissioner's ultimate

[1] Hall, who had only attended school through the seventh grade, indicated on his application that he was a high school graduate.

findings unsupported by substantial evidence due to a single misrepresentation made in 1992.

Apportionment.

The September 30, 2002 low back injury occurred while Hall was disabled and drawing compensation in connection with the earlier February 7, 2001 injury. Pella claims the agency erred in allowing Hall a "double recovery" by awarding permanent partial benefits from October 11, 2002 to March 30, 2003.

The apportionment rule in effect at the time of the injury, Iowa Code section 85.36(9)(c)[2], provides:

> In computing the compensation to be paid to any employee who, before the accident for which the employee claims compensation, was disabled and drawing compensation under the provisions of this chapter, the compensation for each subsequent injury shall be apportioned according to the proportion of disability caused by the respective injuries which the employee shall have suffered.

This section applies where an employee suffers a compensable injury while the employee is incapacitated to work because of another compensable injury and is receiving disability or healing period benefits. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 466 (Iowa 2004).

The agency correctly determined section 85.36(9)(c) was triggered in the context of this case. *See id.* at 467 (interpreting "disability" in the context of section 85.36(9)(c) to refer to entitlement to workers' compensation benefits). The low back injury of September 30, 2002, occurred while Hall was disabled

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[2] The Iowa Legislature repealed subsection (c), effective September 7, 2004. However, subsection (c), as stated above, was still in effect at the time the injuries in the instant case occurred, and the statute in effect at the time of the injury is controlling. *See* 2004 Iowa Acts, 1st Ex. Sess. ch. 1001, § 18 (providing amendment applies to injuries occurring on or after September 7, 2004); *Brown v. Star Seeds, Inc.*, 614 N.W.2d 577, 581 (Iowa 2000) (holding statute in effect at time of injury is controlling).

and drawing partial benefits in connection with the previous injury of February 7, 2001. However, the agency, as affirmed by the court on judicial review, determined that the two disabilities "merged" on March 31, 2003, when they became a state of permanent total disability. In sum, the court ordered that Pella was liable for "permanent partial disability benefits from June 4, 2001 through March 30, 2003, and for paying total disability benefits commencing on March 31, 2003."

Pella believes there was an impermissible overlap between the payment of permanent partial disability benefits and temporary total disability benefits during the period from October 11, 2002, when Hall first missed work in connection with the second injury, through March 30, 2003, the day before compensation for the second injury was stipulated to commence. Pella maintains there was a double recovery of weekly benefits during this period and requests that this court reverse such award.

We agree with the agency there was no improper double recovery of benefits during this disputed time frame. The agency noted that the rate for the first injury was $339.01 and that parties stipulated the rate for both injuries would also be $339.01. It opined that "since the rate is the same for both injuries, apportionment is largely an academic exercise." This analysis is appropriate. The parties stipulated below that compensation for the second injury would commence on March 31, 2003. This stipulation was accepted by the deputy. Accordingly, Pella was liable to Hall for permanent partial disability from June 4, 2001 through March 30, 2003, and for total disability commencing on March 31, 2003. At no point was Hall found to be more than 100% totally and permanently

disabled, as was the case in *Mycogen*. Hall never collected, nor is he entitled to collect, over 100% of allowable benefits. Pella only paid permanent partial disability through March 30, 2003, when the injuries were deemed to have merged.

AFFIRMED.