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**TERRY PERDUE, Petitioner-Appellant, vs. CITY OF DES MOINES,
Respondent-Appellee.**

No. 2-599 / 01-2016

COURT OF APPEALS OF IOWA

2003 Iowa App. LEXIS 191

March 12, 2003, Filed

NOTICE:

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY.

SUBSEQUENT HISTORY: Reported at *Perdue v. City of Des Moines, 2003 Iowa App. LEXIS 1624 (Iowa Ct. App., Mar. 12, 2003)*

PRIOR HISTORY: Appeal from the Iowa District Court for Polk County, George Bergeson, Judge. Terry Perdue appeals from the district court's ruling on judicial review affirming the workers' compensation commissioner's decision finding he had not sustained a work-related injury.

DISPOSITION: AFFIRMED.

COUNSEL: Donald Beattie of Beattie Law Firm, P.C., Pleasant Hill, for appellant.

Steven Lussier, Assistant City Attorney, Des Moines, for appellee.

JUDGES: Considered by Huitink, P.J., and Zimmer and Miller, JJ.

OPINION BY: MILLER

OPINION

MILLER, J.

Terry Perdue appeals from the district court's ruling on judicial review affirming the workers' compensation

commissioner's decision finding he had not sustained a work-related injury. He claims the court erred in finding the commissioner's decision was supported by substantial evidence in the record. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS

The [*2] appellant, Terry Perdue, alleges he sustained a work-related injury to his right shoulder on November 19, 1996, entitling him to permanent partial disability benefits. At that time the claimant was a custodian for the City of Des Moines (the City) and claims he injured his right shoulder while using a mop wringer in the course of his employment. However, on November 13, 1996, Perdue visited his family physician, Dr. Billings, complaining of an inability to lift his right arm and having pain lifting his arm more than ninety degrees. Shortly after the alleged injury on November 19 Perdue saw two of the City's physicians, Drs. Berg and Wirtz, who diagnosed him with rotator cuff tendonitis and strain in his right shoulder. Perdue then saw Dr. Kenney who restricted him to light duty work at waist or tabletop level. He returned to work shortly thereafter with these restrictions regarding his right arm. After attempting to work with these restrictions for a while, Perdue was asked to go home by his supervisor and has not returned to work since. Perdue received healing period benefits from the City after the alleged injury until the deputy commissioner issued her arbitration decision on June 18, 2000.

[*3] In the meantime Perdue had filled out the required accident report for the City on November 20, 1996, and did not mention any of the same or very similar problems he reported to his family physician on November 13, despite the fact this question was specifically asked on the report. Perdue also saw Dr. Berg on November 20 and did not report any prior problems with his right arm to Dr. Berg at that time. Additionally, Perdue filled out a medical history form on January 13, 1997, at the Iowa Orthopedic Center and did not list that he had any similar problems prior to the alleged November 19 injury.

Perdue filed his claim with the Iowa Workers' Compensation Commissioner on February 25, 1998. After an arbitration hearing a deputy commissioner issued the arbitration decision on January 18, 2000, determining that Perdue was not entitled to any workers' compensation benefits because he did not sustain a work-related injury on November 19, 1996. The deputy concluded that whether Perdue sustained a work related injury is a fact question turning in large part on Perdue's credibility and the deputy found that he was not a credible witness. The deputy based this credibility determination on [*4] the fact that Perdue had reported a similar injury to his family physician six days prior to the alleged work injury and yet failed to tell any of the subsequent health-care providers about the previous symptoms; he had several times changed his story concerning how the alleged incident occurred; and surveillance tapes taken over a period of months showed him using his right arm and raising it above his head despite his claims he could not do so. Based on this credibility determination and the facts upon which it was based the deputy found Perdue had not met his burden of proving by a preponderance of the evidence that the alleged injury arose out of and in the course of his employment. Accordingly, the deputy concluded Perdue should not receive any compensation benefits for this injury and that all other issues raised by him were moot.

Perdue appealed the deputy's arbitration decision and the chief deputy summarily affirmed and adopted the arbitration decision as final agency action on November 27, 2000.¹ Perdue then filed a petition for judicial review with the district court on December 5, 2000 alleging there was not substantial evidence in the record to support the agency's [*5] determination that his injury was not work related. The district court affirmed the agency's decision. The court concluded there was sufficient evidence to support the commissioner's findings that Perdue was not a credible witness and that his shoulder injury was not attributable to his employment with the City. The court also found there was no merit to Perdue's argument that the City's payment of healing period benefits constituted an admission his injury was work-related. It held that although such payments could be considered by the agency as evidence of a work-related injury, they were not conclusive evidence of such.

¹ The commissioner issued an order on November 27, 2000, delegating authority to the chief deputy to issue the final agency action in this case pursuant to *Iowa Code section 86.3* (1999).

Perdue appeals from the district court's decision, contending the court erred in finding there was substantial evidence in the record to support the agency's determination that he did [*6] not sustain a work-related injury on November 19, 1996.

II. SCOPE AND STANDARDS OF REVIEW

Our scope of review of final agency action is governed by *Iowa Code chapter 17A* and is confined to correction of errors of law. *Iowa Code § 17A.19* (1999); *Pointer v. Iowa Dep't of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996).² The principles underlying judicial review of an agency decision provide that when a district court exercises the power of judicial review conferred by *section 17A.19* it is functioning in an appellate capacity to correct errors of law, as specified in *section 17A.19(8)*. *Harlan Sprague Dawley, Inc. v. Iowa State Bd. of Tax Review*, 601 N.W.2d 66, 68 (Iowa 1999). Therefore, when we review a decision a district court rendered pursuant to *section 17A.19* the sole question is whether the district court correctly applied the law. *Id.* "In order to make that determination, this court applies the standards of *section 17A.19(8)* to the agency action to determine whether this court's conclusions are the same as those of the district court." *Id.* (quoting *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162, 165 (Iowa 1982)). [*7]

² We note, as did the district court, that 1998 amendments to *section 17A.19* do not apply because this case began on February 28, 1998 and the amendments apply only to cases commenced after July 1, 1999. See 1999 Iowa Acts ch. 1201, §§ 22-24, 46.

We will uphold an agency's action against a claim it is unsupported by substantial evidence in the record made before the agency when the record is viewed as a whole. *Pointer*, 546 N.W.2d at 625. Evidence is substantial when a reasonable person could accept the evidence as adequate to reach the findings made by the agency. *Id.*

Evidence is not insubstantial merely because it would have supported contrary inferences. Nor is evidence insubstantial because of the possibility of drawing two inconsistent conclusions from it. The ultimate question is not whether the evidence supports a different finding but whether the evidence supports the findings actually made.

City of Hampton v. Iowa Civil Rights Comm'n, 554 N.W.2d 532, 536 (Iowa 1996). [*8] Therefore, if the agency's findings of fact are supported by substantial evidence, those findings are binding on us. *Id.*

III. MERITS

"The burden rests upon petitioner [Perdue] to show by a preponderance of the evidence that the injury arose out of and in the course of his employment. [A] possibility is insufficient; a probability is necessary." *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 849 (Iowa 1995) (citations omitted). It is within the province of the commissioner to determine the credibility of the witnesses. *E.N.T. Assocs v. Collentine*, 525 N.W.2d 827, 830 (Iowa 1994). Findings of the commissioner have the force and effect of a jury verdict and the commissioner, not the court, weighs the evidence. *Kiesecker v. Webster City Custom Meats, Inc.*, 528 N.W.2d 109, 111 (Iowa 1995).

The district court found there was substantial evidence in the record to support the agency's determination that Perdue failed to prove he sustained a work-related injury on November 19, 1996. In doing so the court concluded substantial evidence supported the commissioner's finding that Perdue was not a credible witness, stating [*9] in part:

On more than one occasion Perdue stated that he could not use his right arm, but the surveillance videotapes show otherwise. Throughout the video, Mr. Perdue is seen using his right arm. There is also evidence that Mr. Perdue falsified his employment application. With all these factors weighed together, the commissioner as finder of fact, determined that the claimant was not very credible. Based on the commissioner's lengthy discussion of claimant's truthfulness, it appears that she found Mr. Perdue's credibility to be determinative of this case. Because this court's review of a workers' compensation decision is not de novo, the court must not reassess the weight to be given to various items of evidence. Weight of evidence remains within the agency's exclusive domain.

(Citations omitted). Based on our review of the record as a whole, we agree with the district court's conclusions.

The determination of whether a work-related injury occurred on November 19, 1996, was a contested fact issue the resolution of which depended heavily on Perdue's credibility. Such questions of witness credibility are for the agency, not this court, to decide and as long as there is substantial [*10] evidence in the record to support such findings they are binding on us. *See City of Hampton*, 554 N.W.2d at 536; *Dunlavey*, 526 N.W.2d at 853-54. Based on Perdue's report of nearly identical symptoms to his family physician six days prior to his alleged work-related injury and his failure to then inform any of his subsequent health-care providers of such previous symptoms, the fact he several times changed his story as to how the alleged injury occurred, and the evidence on the surveillance tapes showing him raising and using his right arm despite his claims that he could not do so we, like the district court, conclude there was substantial evidence in the record to support the agency's determinations that Perdue lacked credibility and that he did not meet his burden to prove he sustained an injury arising out of and in the course of his employment on November 19, 1996.

In support of Perdue's argument that there is not substantial evidence in the record to support the agency's determinations he points to the fact the City voluntarily paid him benefits after his alleged injury and asserts that the agency erred in failing to take this fact into consideration. [*11] Initially we note that the district court did not address or decide this specific issue in its decision and Perdue filed no motion pursuant to Iowa Rule of Civil Procedure 1.904(2) asking the court to address this issue.³ "Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal." *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2 352, 356 (Iowa 1995). "It is well settled that a rule 179(b) [now rule 1.904(2)] motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense or legal theory properly submitted to it for adjudication." *State Farm Mut. Auto Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984). This rule is applicable to judicial review of agency action. Iowa R. Civ. P. 1.1603(3); *Tussing v. George A. Hormel & Co.*, 417 N.W.2d 457, 457-58 (Iowa 1988). Although the court did determine that payment of such benefits was not an admission by the City that Perdue's injury was work-related, it did not address whether the commissioner erred in failing to take evidence of payment of benefits into consideration. Accordingly, [*12] we find that Perdue has not preserved error on this issue. However, we need not rest our determination of this issue on principles of error preservation as we also find the issue to be without merit.

3 We question whether this issue was ever presented to the district court for adjudication, as Perdue's brief to the district court did not identify it as an issue on judicial review. However, as the issue was not properly preserved for our review we need not determine whether it was not presented to the district court as well as not being addressed and decided by that court.

Evidence of payment of benefits may be considered by the agency as evidence of a work-related injury, but it is not conclusive in establishing that the injury was work related. *Tussing v. George A. Hormel & Co.*, 461 N.W.2d 450, 452 (Iowa 1990). Although the commissioner did not specifically mention this evidence in the opinion, or what if any weight she gave to it, that does not mean she did not consider it in coming to her [*13] conclusion. While the commissioner's decision must be sufficiently detailed to show the path taken through conflicting evidence, the law does not require the commissioner to discuss each and every fact in the record and explain why she has or has not rejected it. *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 274 (Iowa 1995).

Perdue sets forth additional arguments in support of his contention that the district court erred in finding there was sufficient evidence in the record to support the agency's decision. However, these issues were not properly presented to or ruled upon by the district court and Perdue did not file a rule 1.904(2) motion in order to preserve error on them. Accordingly, Perdue has not preserved error on the remaining arguments and they are not properly before us for our consideration.

IV. CONCLUSION

Based on our review of the record as a whole, and for all of the reasons set forth above, we conclude the district court was correct in finding there is substantial evidence in the record to support the agency's decision. There was

substantial evidence in the record to support the agency's determination that Perdue was not a credible [*14] witness and that he failed to meet his burden to show, by a preponderance of the evidence, he had sustained a work-related injury on November 19, 1996. The district court's decision affirming the workers' compensation commissioner's denial of Perdue's request for workers' compensation benefits is affirmed.

AFFIRMED.