

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED

AUG 22 2016

WORKERS' COMPENSATION

BRADLEY EMMERTH,

Claimant,

vs.

LINWELD,

Employer,

and

NEW HAMPSHIRE INSURANCE
COMPANY,

Insurance Carrier,
Defendants.

File No. 5034410

A P P E A L

D E C I S I O N

Head Note No.: 1803

On August 24, 2010, claimant Bradley Emmerth filed an original notice and petition seeking worker's compensation benefits for a work-related injury which occurred on June 2, 2010. The case proceeded to an arbitration hearing and an arbitration decision was entered on February 15, 2012. The deputy workers' compensation commissioner awarded claimant 30 percent industrial disability. Neither party appealed and the arbitration decision became the final agency action.

On March 16, 2012, claimant filed a review-reopening petition, alleging a change in condition after the arbitration hearing. Claimant dismissed that petition on March 15, 2013. However, claimant re-filed his review-reopening petition on October 29, 2013. The review-reopening petition came before a different deputy commissioner for hearing on January 21, 2015. It was considered fully submitted before the deputy commissioner on February 4, 2015.

On February 24, 2015, the deputy commissioner entered a review-reopening decision. The deputy commissioner found claimant proved an economic change of condition and modified the prior arbitration award to a permanent total disability award. Defendants appeal the review-reopening decision.

Defendants Linweld, employer, and its insurer, New Hampshire Insurance Company, assert on appeal that claimant has not established either a physical or an economic change of condition causally related to the work injury of June 2, 2010.

Defendants request the review-reopening decision be reversed and no further benefits be awarded to claimant.

Claimant urges on appeal that he did establish an economic change of condition, that the deputy commissioner properly weighed the evidence, that claimant produced an unrebutted vocational report such that the permanent total disability award in the review-reopening decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I respectfully disagree with some of the deputy commissioner's findings and analysis. I therefore modify the review-reopening decision and I provide the following analysis.

FINDINGS OF FACT

Defendants challenged claimant's credibility in this proceeding. The deputy commissioner made credibility findings in his decision. The deputy commissioner had the opportunity to observe claimant while testifying and the deputy commissioner's findings in this respect will not be disturbed.

The initial work injury consisted of a compression fracture at the L1 vertebral level in claimant's low back which occurred when a large, heavy cylinder rolled over claimant's body. Claimant's initial complaints to the treating orthopedist, David Hatfield, M.D., involved not only the low back, but bilateral numbness and pain in both arms, right leg pain, and neck pain. (Exhibit 7, p. 5; Ex. U, p. 36) However, the main focus of the treatment and complaints after the initial treatment was claimant's low back pain, which treatment was attributed to the compression fracture.

In the arbitration decision, claimant was found to have suffered a 13 percent permanent partial impairment to the body as a whole based on a rating by William Boulden, M.D. Claimant was found to have permanent lifting restrictions as a result of the work injury as set forth in a functional capacity evaluation (FCE) conducted on January 13, 2011, which determined claimant is limited to jobs which require only light physical demands. Claimant was restricted to lifting up to 20 pounds occasionally. (Ex. 9) In the FCE report, claimant's listed abilities included sitting, standing, walking and crouching. The listed limitations included lifting, carrying, elevated work, squatting, forward bending and ladder climbing. (Id.)

The deputy commissioner, in his arbitration decision, found claimant returned to his job on a full-time basis and was earning more money than at the time of the injury because Linweld accommodated for the permanent restrictions.

In this case, claimant asserts he has suffered a worsening of his physical condition as well as a worsening of his economic condition. The asserted economic loss is based on the fact that his employment at Linweld was terminated by Linweld management on March 1, 2012, only two weeks after the arbitration decision was filed. There is no dispute claimant has been unemployed since that termination.

Change of Medical Condition:

Claimant relies upon the views of two physicians to show a worsening of his physical condition. On February 13, 2013, Basil Hassan, M.D., who performed an evaluation for the Social Security Administration, opined claimant cannot tolerate standing or sitting more than 20 minutes, walking more than two blocks and lifting more than 25 pounds. (Ex. 16, p. 6)

On January 18, 2013, claimant's family doctor reported as follows:

Symptoms: back pain, stiffness and radiating down the posterior right lower extremity. The patient presents with complaints of sudden onset of constant episodes of moderate back pain. The symptoms resulted from a direct blow. The injury occurred at work. Episodes started about 18 months ago. Symptoms are not improved by rest. Symptoms are made worse by standing and sitting. Symptoms are unchanged.

(Ex. 15, p. 1)

At his attorney's request, claimant was evaluated on September 20, 2013, by Marc Hines, M.D., a neurologist. Dr. Hines provided a higher permanent impairment rating of 23 percent. Dr. Hines agreed with the limitations on lifting found in the 2011 FCE, but added limitations on any vibration or extreme temperature exposure; no climbing of ladders due to upper extremity tremors and back pain; and no driving or riding long distances. (Ex. 17, p. 11)

Claimant initially was denied social security disability benefits based only on Dr. Hassan's views (Ex. P & Q), but later was granted those benefits with the addition of Dr. Hines' report. The Social Security administrative law judge based his determination on a finding of severe impairment from the L1 compression fracture in 2010 along with left-side sciatica, hand tremors, and major depressive disorder. The judge found these impairments to preclude even sedentary work. The date of disablement was March 1, 2012, the date claimant was terminated from Linweld.

Based on the limitations found in the 2011 FCE and the additional restrictions by Drs. Hassan and Hines, Lewis Vierling, M.S., a vocational rehabilitation consultant, opined claimant is not employable in the competitive labor market. (Ex. 18)

The fighting issue is whether the views of Drs. Hassan and Hines represent a worsening of claimant's physical condition caused by the injury or just a different opinion of his same disability. Neither Dr. Hassan, nor Dr. Hines, evaluated claimant before the arbitration decision of February 2012.

Dr. Hassan attributes the limitations he recommends to not only back pain, but also pain that extends to the arms and left leg at times and the use of narcotics for pain control. In addition to the compression fracture, Dr. Hines stated as follows:

The patient also has disk bulging that seems to be new compared to older films and these occur at multiple sites below the L1 level. Obviously, the major complaint is continued difficulties with back pain, but the patient has had neck pain throughout, but less severe and now has increasing tremor that is a concern to him.

(Ex. 17, p. 10)

Dr. Hines' impairment rating was the same 13 percent for the compression fracture as before, but five percent was given for the new disc bulges, five percent for cervical or neck pain and ten percent for depression and anxiety. He did not provide a rating for the hand tremors until there was a more complete evaluation of the cervical injury. Dr. Hatfield also reported complaints of "shakiness" in both hands in May 2013, but could not provide an opinion on the etiology of this hand condition without an MRI of the cervical spine and a neurological evaluation. With reference to the hand tremors, Dr. Hines stated as follows:

It does seem quite curious from a timing onset that this has developed, however there is a strained reasoning to easily assume that this is related to the injury and I have therefore avoided this category at this time.

(Ex. 17, p. 11)

Claimant's problems with sitting, standing and climbing are not new. In his hearing testimony in October 2011, in the arbitration proceeding, claimant stated that one of the accommodations he was provided at Linweld was the ability to sit, "if he had to." (Ex. X, p. 28) He also stated he cannot drive for long periods of time due to difficulties with sitting. (Ex. X, pp.36-37) Claimant also stated he has difficulty climbing ladders. (Ex. X, p. 32)

Although claimant is currently taking narcotic medication which adversely impacts his concentration, awareness and ability to drive, he was also taking narcotic pain medications at the time of the arbitration hearing. (Ex. X, p. 30)

I do not find a clear opinion in Dr. Hines' report that the new bulging discs and the neck pain he rated are causally related to the June 2, 2010, injury or compression fracture at L1. He was reluctant to provide a cause for the hand tremors.

~~Claimant now is complaining of left-sided or left leg pain. He clearly complained of this soon after the injury to Dr. Hatfield. However, Dr. Hatfield's records do not show left-sided complaints after that time. At the hearing in October 2011, claimant testified his pain only extended at times into his right leg. (Ex. X, p. 40) There is no medical opinion in evidence causally relating left-sided pain to the work injury.~~

Another neurologist, Michael Jacoby, M.D., opines that any of the complaints beyond the low back pain are not related to the work injury. (Ex. V, p. 47)

I cannot find the restriction against exposure to vibration or extreme temperatures to be related to the original back injury without more clarification by Dr. Hines. They more resemble a restriction due to hand problems.

The deputy commissioner found claimant proved a mental injury and change in condition related to the initial work injury. However, defendants accurately point out claimant withdrew any claim for a mental injury at the commencement of the review-reopening hearing. (Transcript, page 6) Therefore, I disagree with the deputy commissioner in this respect and I enter no findings relative to a mental injury claim other than to concur with the deputy commissioner that any mental claim or condition has not caused any new impediment to return to the work force.

Economic Change of Condition:

Claimant remained employed by the employer at the time of the arbitration hearing. Shortly after the arbitration decision was filed, the employer put new management into place. The employer's new management determined ongoing accommodations could not be provided to claimant and claimant's employment should end because he was not capable of performing the full job duties as a direct result of his work injury.

Claimant's loss of employment with Linweld is clearly related to the permanent work restrictions resulting from his work injury. Loss of claimant's employment at Linweld constitutes a significant economic change that causes a relative change and increase in claimant's industrial disability resulting from the June 2, 2010, work injury.

Industrial Disability:

Claimant was 56 years of age at the time of the review-reopening hearing. He is a high school graduate. Most of his work history consists of manual labor jobs in construction and manufacturing. He is now unable to return to medium or heavy

manual labor, the type of jobs for which he is best suited given his age, education and experience.

Claimant is a manual laborer who now can only perform light duty or no lifting over 20 pounds and no bending or twisting. He cannot sit, stand or walk for prolonged periods of time. He is dependent on narcotic pain medications and has been since the injury.

The deputy commissioner accepted the opinions of claimant's vocational expert. Although not specifically rebutted, I do not find the opinions of the claimant's vocational expert to be convincing. The vocational expert relied upon the findings of the Social Security Administration that claimant is not capable of performing at even the full sedentary work level.

As noted above, I found claimant is capable of lifting 20 pounds and he is capable of working in the light work category. The above restrictions are consistent with the recommendations of the treating physician and Dr. Hines. The vocational expert's decision to evaluate claimant's employability based upon less than sedentary work capabilities results in an overly pessimistic view of claimant's future earning capacity.

The 20-pound restriction is the same restriction considered at the time of the initial arbitration decision. Loss of claimant's employment at Linweld has reduced his future earning capacity and will require him to search for and obtain alternate employment. However, I do not concur with the deputy's commissioner's finding that claimant has no residual or discernible earning capacity. Rather, considering all of the relevant industrial disability factors, I find claimant now has a 60 percent loss of earning capacity as a result of his June 2, 2010, work injury.

CONCLUSIONS OF LAW

A review-reopening claim initiated pursuant to Iowa Code section 86.14(2) requires proof that, after the award or settlement, the claimant's physical disability has increased in a scheduled member case, or his earning capacity has changed in an industrial disability case as a result of a worsened physical or non-physical condition caused by the original work injury. Although we do not require the claimant to demonstrate his change in condition was not contemplated at the time of the original settlement, we emphasize the principles of res judicata still apply—that the agency, in a review-reopening petition, should not reevaluate an employee's level of physical impairment or earning capacity, if all of the facts and circumstances were known at the time of the original action. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009).

Industrial disability includes numerous factors. Therefore, the change in condition supporting a review-reopening award can be a physical change in condition or

an economic change in condition. U.S. West v. Overholser, 566 N.W.2d 873, 875 (Iowa 1997); Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

Industrial disability is generally determined without regard to the accommodations provided by the present employer. U.S. West v. Overholser, 556 N.W.2d 873 (Iowa 2009); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). On the other hand, claimant maintained a legitimate job with the employer after imposition of work restrictions. The arbitration decision was entered under the assumption that the job performed by claimant at the time of the arbitration decision is available in the workforce and is consistent with the permanent work restrictions of an employee. As the Iowa Supreme Court has noted, industrial disability awards may be adjusted in review-reopening proceedings when "critical facts existed but were unknown and could not have been discovered by the exercise of reasonable diligence." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

When the employer's new management made the decision that claimant's permanent work restrictions were not consistent with the work he had been offered and that his employment must be terminated, the critical assumptions and findings made in the underlying arbitration decision were no longer accurate. A change in economic conditions occurred because the assumed labor market available to the claimant shrunk. This constitutes an economic change in condition sufficient to review the prior industrial disability award. Id.; Iowa Code section 86.14.

Of course, the change in condition must be causally related to the work injury. Kohlhaas, 777 N.W.2d at 392. The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man." Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted, Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

A refusal by the employer to return an injured worker to work following a work injury due to new permanent restrictions is evidence of a significant loss of employability. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995); Vosberg v. A.Y. McDonald Mfg. Co., 519 N.W.2d 405, 408 (Iowa App. 1994); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). In this instance, the employer's subsequent determination that claimant's permanent restrictions were not consistent with his job duties and required his termination also demonstrate a significant loss in future earning capacity and loss of employability.

Considering all of the relevant industrial disability factors, I found claimant currently has a 60 percent loss of future earning capacity, which entitles claimant to 60 percent industrial disability, or 300 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u). Defendants have presumably already paid the prior 30 percent industrial disability award from the arbitration decision. Therefore, defendants are ordered to pay claimant an additional 30 percent industrial disability, or an additional 150 weeks of permanent partial disability benefits.

ORDER

IT IS THEREFORE ORDERED that the review-reopening decision of April 21, 2015, is MODIFIED as follows:

Defendants shall pay to claimant an additional 150 weeks of permanent partial disability benefits at a rate of four hundred forty-two and 72/100 dollars (\$442.72) per week from the stipulated date of September 16, 2013.

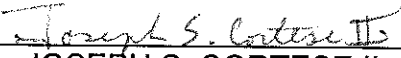
Defendants shall pay accrued weekly benefits with interest in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein from the date of this decision.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, including reimbursement to claimant for any filing fee paid in this matter and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 22nd day of August, 2016.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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