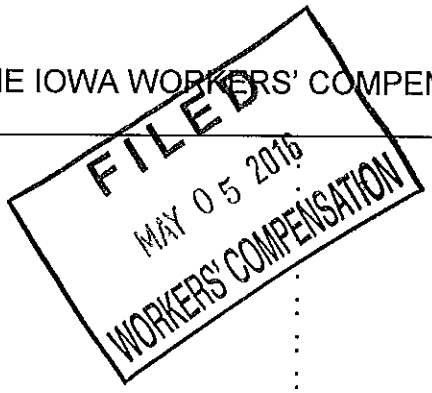
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



GREGORIA TARIN,	File No. 5041272
Claimant,	REVIEW-REOPENING
vs.	DECISION
TYSON FRESH MEATS,	
Employer, Self-Insured, Defendant.	Head Note Nos. 1803, 2403

STATEMENT OF THE CASE

This is a review-reopening proceeding. The contested case was initiated when Tyson Fresh Meats, Inc., filed its review-reopening petition with the Iowa Division of Workers' Compensation. The petition was filed on November 10, 2014. Defendant alleged claimant sustained a change of condition since the arbitration was rendered on March 13, 2014. (Original notice and petition)

Claimant filed her answer on November 14, 2014. The hearing administrator scheduled the case for hearing on December 8, 2015. The hearing took place in Sioux City, Iowa, at the Iowa Department of Workforce Development. The undersigned appointed Ms. Amy Pedersen as the certified shorthand reporter. She is the official custodian of the records and notes. Mr. Frank Gonzalez was sworn as the official Spanish interpreter.

Claimant testified on her own behalf. Defendant called Ms. Mary Berg, front line supervisor, to testify.

The parties offered exhibits. This deputy admitted claimant's exhibits marked 1 through 4. The undersigned admitted defendant's exhibits A and B, plus J-1.

Post-hearing briefs were filed on January 8, 2016. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The sole issue for resolution is:

Whether claimant has sustained a change of condition warranting an award of less permanent/industrial disability benefits than those ordered by the underlying final agency decision.

STATEMENT OF THE CASE

This deputy, after listening to the testimony of claimant and Ms. Berg, at hearing, after judging the credibility of the witnesses, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The arbitration decision in this matter was issued on March 13, 2014 by the undersigned deputy workers' compensation commissioner. Among other matters, claimant was awarded a permanent partial disability in the amount of 55 percent. Defendant was ordered to pay two-hundred seventy-five (275) weeks of permanent partial disability benefits commencing from March 8, 2013 and payable at the stipulated weekly benefit rate of four-hundred sixty-five and 02/100 dollars ($465.02) per week.

On March 28, 2014, defendant filed a notice of appeal to the Iowa Workers' Compensation Commissioner. At the time, the appeal was deemed fully submitted, the undersigned was the acting commissioner. As a result, the writing of the appeal was designated to another deputy to issue. The appeal decision was issued on October 21, 2014 and the deputy affirmed the arbitration decision with respect to the award of permanency.

On November 10, 2014, defendant filed a petition for judicial review with the Iowa District Court in and for Polk County. Claimant filed her answer on November 14, 2014. On December 3, 2015, the Honorable Arthur Gamble, Chief Judge of the Fifth Judicial District, entered a ruling and order on the petition for judicial review. The decision of Deputy Workers' Compensation Commissioner Jennifer Gerrish-Lampe, filed on October 21, 2014 was affirmed. Chief Judge Gamble wrote in his decision:

> The Court finds that there is substantial evidence in the record to support the agency's finding of a 55 percent industrial disability and that the agency's application of the law to the facts was not "irrational, illogical, or wholly unjustifiable." The agency properly considered the appropriate factors in making his determination. Petitioners have failed to demonstrate that the agency application of the law to the facts here was irrational, illogical, or unjustifiable.

(Ruling on Petition for Judicial Review, December 3, 2015)

Defendant now alleges there has been a change of condition since the date of the arbitration decision because claimant has demonstrated the ability to perform work without restrictions. Claimant argues defendant's argument should fail because the arbitration in the underlying action expressly acknowledged claimant's brief 8-week stint of working half-days was only a temporary situation, such that it was not considered as

being a permanent matter as it pertains to claimant's employability, and/or lack thereof. Therefore, the temporary part-time hours did not impact the extent of claimant's industrial disability as assigned by the division in the underlying action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Iowa Code section 85.26(2) permits either the employee or the employer to bring a timely review-reopening proceeding after either an award of weekly benefits or an agreement for settlement under section 85.13, provided that the proceeding is commenced within three years from the date of the last payment of weekly benefits under the award or agreement.

Iowa Code section 86.14(2) provides:

> 2. In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon.

Upon review-reopening, the party bringing the action has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have changed in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957).

In Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 393 (Iowa 2009), the Iowa Supreme Court wrote:

> Although we do not require the claimant to demonstrate his current 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 or knowable at the time of the original action. As this court has explained,
>
> A contrary view would tend to defeat the intention of the legislature [:]... "The fundamental reason for the enactment of this legislation is to avoid litigation, lessen the expense incident thereto, minimize appeals,

> and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act."

Stice, 228 Iowa at 1038, 291 N.W. at 456 (quoting Flint v. City of Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921)).

Claimant is now 50 years old. She was raised and educated in Mexico. Claimant attended school through the seventh grade. She has been married for approximately 30 years and has 5 adult children, and 3 grandchildren. Claimant never worked outside the home when she lived in Mexico. Spanish is her first language. She understands some English but she does not converse well in English. She reads very little English. Claimant is computer illiterate. She is considered an older worker. There is little likelihood claimant is a candidate for retraining, given her poor command of the English language and her lack of formal education.

Claimant immigrated to the United States in 1992. She settled in Storm Lake, Iowa to work at the IBP, Inc. plant, now known as Tyson Fresh Meats, Inc. During the review-reopening hearing, claimant testified she was still employed at Tyson. At the time of the December 8, 2015 hearing, claimant was working in a different job than the one she had held during her arbitration hearing. Claimant currently performs the "cut ham muscles job." The physical demands and requirements of the job are detailed in Exhibit B. They are incorporated by reference as though fully set out herein. Three of the most notable requirements are:

> Bending: Back flexion of 0° to 30° is noted when the Team Member reaches for a ham muscle. Back twisting of approximately 0° to 15° is noted when placing the ham muscle on the take away conveyor.
>
> ....
>
> Reaching: An outward reach of up to approximately 18" is required to grasp the ham muscle and position it for cutting. Shoulder flexion of 0° to 60° is noted. Shoulder flexion of 0° to 90° is noted if the Team Member must aside the ham muscle and ham muscle/cap pieces to the take away conveyors.
>
> Standing: Prolonged standing is required the duration of the work shift. Depending on the work station, climbing 6 stairs is required to reach the work station. There is sufficient knee and toe clearance. Green Ergo stands from 2, 4, 6 or 8 inches are available for team members who need them.

(Exhibit B)

Claimant is currently earning $14.25 per hour. She works 40 hours per week. She does not work any over-time hours. Claimant's spouse works next to her on the assembly line. Claimant testified her spouse helps her meet her performance standards

on the line. She testified credibly; often her husband will process four pieces of meat and she will process one piece. Claimant reported the main problem with her present job is the prolonged standing. The standing causes pain in her low back and down her right leg. Claimant stated she becomes very tired because she stands in the same position all day. She modified the job by leaning against the line behind her. However, members of management informed claimant she was unable to lean while on the job. Claimant testified but for the assistance she receives from her spouse, claimant would not be able to perform this job. In her deposition, claimant testified she plans to remain working at Tyson as long as possible. (Ex. A, p. 9)

Ms. Mary Berg, front line supervisor, testified both at the arbitration hearing and at the review-reopening hearing. She has been claimant's supervisor on the "cut ham muscles" line for the last 4 years. Ms. Berg acknowledged claimant works beside her spouse. The supervisor testified claimant was told she could not rest on the line behind her. It would be unsafe to lean on a moving belt. Ms. Berg stated she did not know about claimant's medical status. The supervisor was not aware claimant had any restrictions imposed upon her. Ms. Berg testified claimant never asked for any accommodations in performing her job duties. The supervisor described claimant as a motivated person who is trying to work.

Claimant testified she follows the restrictions imposed by Dr. Bansal. The restrictions were imposed prior to the arbitration decision. The restrictions were:

> No lifting greater than 25 pounds occasionally, 5 pounds frequently. Lifting any more than that causes her considerable pain and would place additional pressure to her back.
>
> No frequent bending, squatting, climbing, twisting, or kneeling to avoid further damage to the back and keep pain levels in check. These activities cause her undue discomfort.
>
> Sit/Stand/Walk as tolerated. Being in any one position for too long causes her discomfort. Specifically, avoid sitting or standing greater than 60 minutes, and walking more than 20 minutes at a time.
>
> Avoid use of ladders and multiple stairs. It is very difficult and dangerous for Ms. Tarin to perform these tasks.

(Arb. Dec., pp. 12-13)

Claimant explained she does not know of another job in the plant she is capable of performing. She is unable to return to the job on the Cryovac. Claimant reported that job requires twisting, plus lifting greater than 5 pounds. Additionally, there is bending, carrying, and pushing boxes which weigh up to 60 pounds.

In January of 2014, claimant was placed on the "blood shots position." She could only tolerate the job for one week. Claimant reported to her supervisor she was unable

to perform the job as it caused low back pain and right leg pain. The supervisor removed claimant from the job. No one ever assigned claimant to the "blood shots position" again.

Additionally, claimant said she cannot perform the "knuckles job." The position requires claimant to lift more than 5 pounds and to bend and twist regularly. Previously claimant worked on the "knuckles job" for 6 years.

Claimant also testified she is unable to perform the "taking off the hide position." She stated the job requires repetitive bending and twisting. Previously claimant held the job for 2 years.

Claimant stated she is no longer able to return to the job of removing fat. The job also requires twisting and bending. Claimant held the job for 3 years. Likewise, claimant is precluded from performing the job as a skinner. She stated there is constant lifting greater than 5 pounds and frequent twisting in the "skinner position".

This is the only employment claimant has ever held. The chances of claimant finding employment on the open market are nil. She is an unskilled worker who is illiterate. She has no possibilities for retraining at her age.

When all of the factors involving industrial disability are considered, it is the determination of this deputy; claimant still has an industrial disability in the amount of 55 percent. Defendant has failed to establish there has been a change of condition related to the work injury since the original award.

ORDER

THEREFORE, IT IS ORDERED:

Defendant has failed to establish there has been a change of condition in claimant's industrial disability since the original award.

Costs are assessed to defendant.

Defendant shall file all reports as required by this division.

Signed and filed this 5th day of May, 2016.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.