BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN HEEREN,

Claimant,

vs.

WILLOW VALLEY PORK, INC.,

Employer,

and

IMT INSURANCE,

Insurance Carrier,
Defendants.

File No. 5044263

REVIEW - REOPENING

DECISION

Head Note No.: 2905

STATEMENT OF THE CASE

John Heeren, claimant, filed a petition in arbitration seeking a review-reopening of the August 25, 2015, arbitration decision which awarded claimant 30 percent industrial disability as a result of an electrocution injury that occurred on July 16, 2012. The review-reopening hearing was held on January 19, 2018.

The evidentiary record includes Joint Exhibits 1 through 3, Claimant's Exhibits 1 through 3, and Defendants' Exhibits A through E. Claimant provided testimony. In addition, the undersigned takes administrative notice of the underlying arbitration decision filed on August 25, 2015, in this matter.

Counsel for the parties submitted post-hearing briefs on February 21, 2018, and the case was considered fully submitted at that time.

At the hearing, the parties submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted. No factual findings or conclusions of law will be made in this decision regarding the parties' stipulations. The parties are now bound by their stipulations.

ISSUE

The parties submitted the following disputed issue for resolution:

Whether claimant sustained a change in condition, warranting a reassessment of his industrial disability as determined in the August 25, 2015 arbitration decision, and the extent thereof.

FINDINGS OF FACT

Based on claimant's stated age at the prior arbitration hearing, he was 48 or 49 years old at the time of this review-reopening hearing. (Arbitration Decision, page 2) He is right-hand dominant.

On July 16, 2012, claimant sustained an electrocution injury while operating a welder at defendant employer's facility. (Id.) The matter proceeded to arbitration hearing on March 18, 2015, and a decision was issued on August 25, 2015 awarding claimant 30 percent industrial disability. Neither party appealed the arbitration decision.

The deputy in the underlying arbitration decision found that the electrocution injury involved claimant's left hand and produced an exit wound in his right shoulder. (Id.) Claimant's fourth and fifth fingers on his left hand were amputated as a result of the injury and he had grafting for his wounds. The deputy also found that claimant had phantom pain as a result of the work injury. (Arb. Dec. p. 4) The deputy relied on the October 24, 2012, opinion of James Bobenhouse, M.D., a neurologist, who stated that claimant had left arm pain and phantom pain in the area of his amputated fourth and fifth fingers along with electrical burns. Claimant also had intermittent vascular headaches and muscle contraction headaches. The deputy found that claimant was later seen by a pain management physician, Liane Donovan, M.D., who also noted phantom limb pain. (Arb. Dec. p. 2) The deputy found that the phantom pain was a neurologic disruption and compensable as a body as a whole injury, and awarded 30 percent industrial disability.

At the initial arbitration hearing, claimant complained of chronic pain and asserted that he was permanently and totally disabled. (Arb. Dec. pp. 3, 5) He also argued that he had been fired from the defendant employer and not returned to meaningful work. (Arb. Dec. p. 4) Claimant's last day of work for the defendant employer was the date of the injury. He was terminated from his employment at Willow Valley and did not return to work for the defendant employer. He was unemployed at the time of the prior arbitration hearing despite having sought employment and completed applications to work at other businesses. (Arb. Dec. p. 3) The deputy found that claimant's three prior OWI convictions, which included a prison sentence presented a "substantial barrier to entering the workforce," and claimant's continued habit of drinking multiple beers daily, represented poor judgment. (Arb. Dec. p. 5)

Claimant agreed that he has three prior OWI convictions which pre-date the prior arbitration decision, but stated that he did not believe his felony OWI convictions have impacted his ability to get work. However, claimant stated in his deposition that he was in training with a company called PTI, to drive railroad workers to specific locations and agreed that he did not get that job due to his OWI convictions.

At the review-reopening hearing, claimant submitted a job search record which begins with March 2014, one year before the previous arbitration hearing and continued through January 4, 2018. (Ex. 2) There are multiple job contacts noted. There is also a substantial gap between February 23, 2017 and December 8, 2017 with no job search efforts recorded during that time. (Ex. 2, p. 3) This was explained by claimant that in late January 2017, he applied for work at Adventure Staffing. (Ex. A, p. 1) Claimant testified that he went to work through Adventure Staffing at Sioux Automation in February 2017 and he was then hired as a direct employee of Sioux Automation in August 2017. He continued to work there at the time of the review-reopening hearing.

In February, 2017, he advised Adventure Staffing that he would be able to lift 90 pounds throughout his shift and that he had no condition or injury that would affect his ability to work with or without reasonable accommodations. (Ex. A, p. 7)

The deputy in the underlying arbitration decision found that claimant had work experience in farming, manufacturing, meat production and cold storage, and as a laborer. (Arb. Dec. p. 2) In addition, claimant has worked as a truck driver, mechanic, a welder, and as a self-employed livestock and grain farmer. (Ex. B, pp. 26-27) Claimant's current employment at Sioux Automation involves running a "plas" table, which involves maneuvering metal either by hand or with a hoist on and off a table and using the computerized program to cut the metal into the desired shapes. Claimant lifts up to about 50 to 55 pounds by hand and uses a hoist for heavier pieces. He runs the computer program to cut the metal and sands the rough portions of the cut metal. His rate of pay at the time of the hearing was $15.98 per hour and he works four, ten-hour days per week.

The job at Sioux Automation was the first regular full-time work claimant has had since his termination from employment with the defendant employer. Claimant testified that he also recently applied to do maintenance work at Pride Group and as a forklift operator at Civco, but he did not get either job. He applied for these jobs because he is concerned about how much longer he can keep doing his current job due to the pain in his hand.

Claimant testified that during his job search efforts, he suspected that some employers would not hire him because of his hand, but offered no direct proof of this suspicion.

Claimant testified that he has had increased pain since the prior arbitration decision and particularly while working at his new job at Sioux Automated. He stated that after working a 40-hour week his hand hurts and he sometimes ices his hand during breaks and after work. However, claimant agreed that he did not report any difficulty he was having at Sioux Automated to his employer until the week prior to the review-reopening hearing.

After the prior arbitration decision, claimant has continued to be seen at the Siouxland Pain Clinic. (Ex. JE1) On February 26, 2015, prior to the March 15, 2015

arbitration hearing, claimant was taking 600 mg of Gabapentin 3 times per day and one 300 mg capsule at bedtime. (Ex. JE1, p. 15) He was also taking 20 mg of Methadone four times per day. (Ex JE1, p. 17) On June 25, 2015, the Gabapentin was increased to 600 mg four times per day; however, there was no longer a separate bedtime dose mentioned. (Ex. JE1, p. 27) Claimant continued to treat at Siouxland Pain Clinic monthly for medication management.

In November, 2015, it was recommended that claimant receive a robotic prosthesis and a silicone prosthesis. (Ex. 3, p. 1)

Claimant reported reduced energy levels and in December, 2015 he stated that testosterone injections he was receiving to counter the effects of the methadone were improving his energy and stamina. (Ex. JE1, p. 43)

On March 24, 2017, claimant reported to his medical provider that he began working at Sioux Automation three weeks prior and that "his pain is reasonably well controlled on the current regimen," and "he denie[d] any issues or concerns." (Ex. JE1, p. 98) Although, he noted that his new job does not allow him to use his prosthesis which he had been using pretty regularly. (Id.) At this time his Gabapentin and Methadone was at the same dose that had been established over 20 months ago in June, 2015.

Claimant reported in April, May, June, July and August, 2017, that his pain was controlled with the medications. (Ex. JE1, pp. 100, 103, 106, 109, & 112) However, in July, 2017, his Gabapentin regimen was apparently increased to include an additional 300 mg capsule "hs," at bedtime. (Ex. JE1, p. 111) At the same time his Methadone was decreased from 20 mg to 10 mg, four times per day. (Ex. JE1, p. 110) On October 13, 2017, the gabapentin was reduced back to the level that had been previously established in June, 2015, over 27 months earlier. Therefore, the increase in July, 2017 was temporary.

Claimant testified that he has seen no new physicians since the prior arbitration decision.

At the time of the prior arbitration decision, the deputy found that claimant had been released to return to work as tolerated with the left hand by his treating physicians in Lincoln, Nebraska. (Arb. Dec. p. 4) Claimant testified that he had no new permanent work restrictions, and he presently has no permanent work restrictions at all.

Claimant's residence and education remains unchanged since the prior arbitration hearing.

There is no expert medical opinion suggesting any physiological deterioration or change to claimant's condition.

Claimant has not been advised by anyone at Sioux Automation that he is not meeting performance standards.

At the prior arbitration hearing, in March 2015, claimant testified that he had ongoing phantom pain from the amputated fingers. (Ex. B, p. 18) He described the pain as constant. (Id.) He also described the pain in the area of his missing fingers and the stubs and that the pain travels up his arm and into his shoulder. (Ex. B, pp. 18-19) Claimant stated that the pain was aggravated by the weather and described the pain as "dreadful." (Ex. B, pp. 18, 19)

In his deposition taken in December, 2017, claimant stated that the pain from his hand extended into his wrist, and occasionally the pain goes just a few inches past his wrist toward his elbow. (Ex. C, p. 44)

By his description the area of his effected upper extremity, it appears to be less than it was at the time of the arbitration hearing in March 2015.

I find when viewing the evidence as a whole that the greater weight of the evidence indicates that claimant's condition has remained fairly stable since the arbitration hearing in March, 2015, without significant change.

CONCLUSIONS OF LAW

The first issue is whether claimant sustained a change in condition causally related to the original work injury following the arbitration hearing on March 18, 2015.

Iowa Code section 86.14(2) provides: "[i]n 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."

In a review-reopening, "[t]o justify an increase in compensation benefits, the claimant carries the burden of establishing by a preponderance of the evidence that, subsequent to the date of the award under review, he or she has suffered an impairment or lessening of earning capacity proximately caused by the original injury." *Simonson v. Snap-On Tools Corp.*, 588 N.W.2d 430, 434 (Iowa 1999).

The Supreme Court stated in *Kohlhaas v. Hog Slat, Inc.*, "The review-reopening claimant need not prove, as an element of his claim, that the current extent of disability was not contemplated by the commissioner (in the arbitration award) or the parties (in their agreement for settlement)." *Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 392 (Iowa 2009).

The Supreme Court also stated in the case of *Kohlhaas v. Hog Slat, Inc.*, stated that:

> A compensable review-reopening claim filed by an employee requires proof by a preponderance of the evidence that the claimant's current condition is "proximately caused by the original injury." *See Simonson*, 588 N.W.2d at 434 (original emphasis omitted) (quoting *Collentine*, 525

> N.W.2d at 829). While worsening of the claimant's physical condition is one way to satisfy the review-reopening requirement, it is not the only way for a claimant to demonstrate his or her current condition warrants an increase of compensation under section 86.14(2). *See* *Blacksmith v. All–Am., Inc.*, 290 N.W.2d 348, 354 (Iowa 1980) (holding a compensable diminution of earning capacity in an industrial disability claim may occur without a deterioration of the claimants physical capacity).

Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009)

The principles of res judicata apply in a review-reopening situation. "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." *Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 393 (Iowa 2009).

"[S]ection 86.14(2) does not provide an opportunity to re-litigate causation issues that were determined in the initial award or settlement agreement." *Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 393 (Iowa 2009).

The underlying file proceeded to hearing on March 18, 2015 and the deputy issued an order on August 25, 2015. Since that time, claimant asserts that he has had an increase in his left hand pain. Claimant points to his icing of his hand and the changes in his Gabapentin dosage in support of this argument. However, the record indicates that claimant's Gabapentin dosage has been fairly stable since the arbitration hearing with only a temporary increase. I do not find that the adjustments reflected in the records standing alone support a change in circumstances to support a review-reopening.

I further note that claimant's description of his pain at his deposition in December 2017 compared to his testimony at the arbitration hearing, appear to indicate a reduction in the physical area of his upper extremity pain.

I also note that there is no medical opinion from any physician or other medical provider supporting any physiological change in claimant's condition that might cause an increase in pain.

I note that claimant ceased working for the defendant employer on the date of the injury and was unemployed at the time of the prior arbitration hearing. Upon his return to regular work at Sioux Automation, he repeatedly told his treating physicians at Siouxland Pain Clinic that his pain levels were well controlled with his medication regimen, which remained largely unchanged.

Claimant argues that his return to full-time work with no restrictions should warrant an increase in his industrial disability. I disagree. I conclude that claimant has

demonstrated an improvement in his economic condition and an ability to obtain and maintain employment as he continues to work without restrictions.

I conclude that claimant has failed to carry his burden of proof that he has sustained a substantial change in circumstances that requires the previous arbitration decision to be reevaluated.

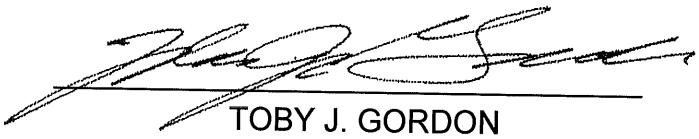
ORDER

IT IS THEREFORE ORDERED:

Claimant shall take nothing.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 22nd day of May, 2018.



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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.