BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VIRGINIA BROWNRIGG, Claimant, vs. GITS MANUFACTURING CO., LLC, Employer, and TRAVELERS PROPERTY CAS. CO., Insurance Carrier, Defendants.	File No. 5042388.01 REVIEW-REOPENING DECISION Head Note Nos: 2501, 2502, 2905

STATEMENT OF THE CASE

Claimant, Virginia Brownrigg, filed a petition in review-reopening seeking workers' compensation benefits from Gits Manufacturing Company (Gits), employer, and Travelers Property Casualty Company, insurer, both as defendants. This matter was heard on April 21, 2021, with a final submission date of May 19, 2021.

The record in this case consists of Joint Exhibits 1-2, Claimant's Exhibits 1-5, Defendants' Exhibits A-D, and the testimony of claimant.

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. Whether claimant is entitled to additional permanent partial disability benefits under a review-reopening proceeding.

2. Whether there is a causal connection between the injury and the claimed medical expenses.

3. Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

4. Costs.

FINDINGS OF FACT

Claimant was 74 years old at the time of the hearing. Claimant attended school through 9th grade. She does not have a GED. (TR p. 10)

Claimant began working at Gits in 1974. Claimant was in a layoff status for a few years. Other than the layoff, claimant worked continuously for Gits until July 8, 2011, when she retired. Claimant worked for approximately one year helping her father as a custodian in a local movie theater. Claimant has no other work experience. (TR p. 12)

In November 2011 claimant was diagnosed with cancer in the right lung. On December 1, 2011, claimant had surgery and a large part of her right lung was removed. (Appeal Decision, p. 2)

An arbitration decision dated December 29, 2014, found claimant failed to carry her burden of proof her injury arose out of and in the course of her employment. An appeal decision dated August 11, 2016, reversed the arbitration decision. The appeal decision found that claimant carried her burden of proof her lung cancer arose out of and in the course of employment with Gits. The decision found that claimant had a 75 percent loss of earning capacity or industrial disability. That finding was based, in part, on the finding by two experts that claimant had a 60 percent permanent functional impairment. At the time of the arbitration hearing, claimant was doing some housework. She was limited to doing sedentary work only. (Appeal Decision, p. 7)

From August 2014 through August 2016 claimant had ongoing follow-up care with Bradley Hiatt, D.O. (Joint Exhibit 2, pp. 98-119) On August 30, 2019, Dr. Hiatt found that claimant had no evidence of a reoccurrence of lung cancer. Claimant's care was returned back to her family physician, Thomas Young, D.O. (JE 2, pp. 118-119)

On January 9, 2019, claimant was prescribed an inhaler of albuterol. (JE 1, p. 21)

On November 30, 2019, claimant was seen in the emergency department at the Greater Regional Medical Center with difficulty breathing. Claimant had decreased breath sounds on the right lung which had been the lung that was partially removed. Claimant was assessed as having a possible right lung pneumonia. Claimant was admitted to the hospital. (JE 1, pp. 29-43)

On December 2, 2019, claimant was evaluated by Joshua Capson, D.O. Dr. Capson put claimant on oxygen therapy, opining claimant would likely require oxygen therapy on discharge. (JE 1, p. 46)

On December 9, 2019, claimant was discharged from the hospital. Claimant was recommended to have lifetime oxygen therapy. (JE 1, pp. 70-76)

On December 13, 2019, claimant was evaluated by James Gerdes, D.O. Claimant was continued with oxygen supplementation. Claimant continued to treat with Dr. Gerdes for emphysema and chronic respiratory failure. (JE 1, pp. 78, 97)

On May 6, 2020, claimant was evaluated by Qurrat Ul Ain Nawab, M.D., for respiratory issues. Claimant had issues with sleeping. Claimant was scheduled for a sleep study and continued on oxygen. (JE 1, pp. 85-87)

In a February 16, 2021 report, Peter Matos, D.O., gave his opinion of claimant's condition following a records review. He assessed claimant as having chronic progressive respiratory disease commencing on June 10, 2012. (Defendants' Exhibit A)

In a March 12, 2021 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. He found claimant's condition had worsened since he last evaluated her in 2014. (Claimant's Exhibit 1)

Dr. Bansal found that claimant had an 80 percent permanent impairment due to her pulmonary disease. This is based on the fact that claimant required 24-hour oxygen supplementation, that she was confined to her house and that her pulmonary status had worsened secondary to the natural progression of her lung carcinoma. He opined claimant did not have the capacity for any type of work. (Ex. 1)

On March 22, 2021, Dr. Gerdes responded to a letter written by claimant's counsel. Dr. Gerdes indicated he treated claimant for chronic respiratory failure that required claimant to be on continuous oxygen supplementation. He indicated her condition had worsened. He opined claimant would not be able to work in any occupation requiring exertion. (Ex. 2, pp. 15-16)

Claimant testified she could not work at her old job at Gits at the time of hearing. (TR p. 12) She testified she is less active at the time of her review-reopening hearing than she was at the 2014 arbitration hearing. This is largely because she is on full-time oxygen. (TR p. 35)

Claimant said she was unable to function without her oxygen. (TR p. 19) She said she does not believe there is any work she could do given her current condition. (TR p. 23)

Claimant has not applied for work since the arbitration hearing. (TR p. 24)

Claimant testified she still does some light household chores. (TR pp. 25-27) She said she still goes shopping, but needs a grocery cart to carry her oxygen. (TR p. 33)

CONCLUSION OF LAW

The first issue to be determined is whether claimant has a change in condition that would entitle her to additional permanent partial disability benefits under a review-reopening proceeding.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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).

Upon review-reopening, claimant 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 worsened or deteriorated 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). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

In a review-reopening proceeding the claimant has the burden of proof to prove whether she has suffered an impairment of earning capacity proximately caused by the original injury. E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994).

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Malget v. John Deere Waterloo Works, File No. 5048441 (Remand Dec. May 23, 2018); Rus v. Bradley Puhrmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boone's Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also, Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Claimant had a portion of her right lung removed due to cancer. At the time of the 2014 hearing, claimant was assessed as having chronic respiratory failure. Both Dr. Gerdes and Dr. Bansal opined claimant's chronic respiratory failure has deteriorated since the 2014 hearing. (Ex. 1, 2) Even Dr. Matos appears to opine claimant's respiratory condition has progressively deteriorated. (Ex. A) Since December 2019 claimant has been on 24-hour oxygen supplementation.

There is no evidence to suggest that claimant's physical condition has not worsened since her 2014 arbitration hearing. Given this record, claimant has carried her burden of proof that her physical condition has worsened since the 2014 arbitration hearing.

Claimant also needs to carry the burden of proof to show that her worsening physical condition resulted in a reduction of her earning capacity. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009)

Claimant was not working at the time of her arbitration hearing. (Appeal Decision, p. 7) At the time of the review-reopening hearing, claimant was still not working. (TR p. 24) Claimant had not applied for any work at the time of her arbitration hearing. (Appeal Decision, p. 7) At the time of her review-reopening hearing, claimant had not applied for work. (Ex. B, p. 3) At the time of the arbitration hearing, claimant's income consisted of Social Security and her pension from Gits. (Appeal Decision, p. 7) At the time of her review-reopening hearing, claimant's income still consisted of Social Security and her pension from Gits. (TR pp. 9-10) At the time of the arbitration hearing, claimant had retired. (Appeal Decision, p. 7) At the time of her review-reopening hearing, claimant was still retired. (TR p. 9)

Claimant retired from work at the time of her arbitration hearing. Claimant was still retired at the time of her review-reopening hearing. At the time of her arbitration hearing, claimant's income was Social Security Retirement and her pension from Gits. At the time of her review-reopening hearing, claimant's income still consisted of her Social Security Retirement and her pension from Gits. The record indicates claimant voluntarily removed herself from the workforce. Her economic situation is the same at the time of the review-reopening hearing as it was at her arbitration hearing.

At the time of her review-reopening hearing, claimant had never returned to the workforce. As claimant retired, and has continued in retired status, it is unclear how claimant has had a loss of earning capacity. I am unable to find any legal precedent that indicates a claimant has had a loss of earning capacity when, at the time of both her arbitration hearing and her review-reopening hearing, claimant remained retired. Claimant does not cite to any precedent that would indicate she has a loss of earning capacity since she has been retired since 2011.

I recognize the seriousness of claimant's medical condition. I empathize with the fact that she has to be on oxygen 24 hours a day. However, I see no evidence claimant has had an increase in loss of earning capacity proximately caused by the original injury. This is because claimant was retired at the time of the arbitration hearing and remained retired up to the time of the review-reopening hearing.

Claimant has carried her burden of proof she had a worsening of her medical condition. As detailed above, she has failed to show that the worsening of her physical condition has resulted in a loss of earning capacity. Given this record, claimant has failed to carry her burden of proof she is entitled to additional permanent partial disability benefits under review-reopening proceeding.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred

for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975)

Defendants do not dispute they are liable for medical expenses related to claimant's pulmonary disorder. (Defendants' Post-Hearing Brief, p. 7) Defendants indicate, and the record supports, that some of the billings that claimant has submitted for reimbursement are for treatments not related to the pulmonary injury. For example, claimant seeks reimbursement for blood testing for her diabetes on January 4, 2018, January 9, 2019, and December 13, 2019. This does not appear to be related to claimant's pulmonary injury. Claimant has also had Doppler testing for what appears to be a potential stroke concern. Claimant has also had osteoporosis exams and annual physical exams. Defendants are not liable for charges not associated with the pulmonary condition. The parties shall work to resolve the payment of expenses related to claimant's pulmonary condition. If the parties are unable to reach a resolution of this issue, claimant may file a petition specific to alleged outstanding medical expenses.

The final issue to be determined is whether claimant is entitled to reimbursement for an IME.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co.,

Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Bansal, the employee-retained expert, issued an IME report on March 12, 2021. Dr. Matos issued his report on February 16, 2021. Dr. Matos' report does not give opinions regarding claimant's permanent impairment. Because Dr. Matos does not address claimant's permanent impairment in his report, claimant is not entitled to reimbursement for the IME under Iowa Code section 85.39.

ORDER

THEREFORE IT IS ORDERED:

That claimant shall take nothing in the way of additional permanent partial disability benefits.

That defendants are liable only for expenses related to claimant's pulmonary condition.

That both parties shall pay their own costs.

That defendants shall continue to file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 20th day of September, 2021.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Neal (via WCES)

Timothy Wegman (via WCES)

Alison Stewart (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.