

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HAMIDA ODOBASIC,

Claimant,

vs.

KINSETH HOTEL CORP., d/b/a  
HOLIDAY INN,

Employer,

and

EMC INSURANCE COMPANY

Insurance Carrier,  
Defendants.

**FILED**

**OCT 12 2015**

**WORKERS' COMPENSATION**

File No. 5011318

**REHEARING**

**DECISION**

STATEMENT OF THE CASE

On September 11, 2015, claimant filed a request for rehearing. Defendants resisted the application on September 25, 2015. The undersigned issued a preliminary rehearing decision indicating a decision on the merits would be filed at a later date.

According to an agreement for settlement between the parties, which was approved by this agency on September 25, 2007, claimant suffered a work injury to her low back on March 4, 2003, resulting in a 75 percent permanent loss of earning capacity. (Exhibit 30) Claimant later was fully paid her entitlement to permanent partial disability under the agreement for settlement. Claimant then returned to work for the defendant-employer. Claimant asserts that after 2007, her physical condition worsened, and she filed a review-reopening petition seeking additional disability and medical benefits attributable to the original March 4, 2003, work injury.

The review-reopening hearing occurred on March 20, 2014, before Deputy Workers' Compensation Commissioner Joseph Walsh.

Before Deputy Commissioner Walsh issued the arbitration decision in this matter, claimant filed another petition alleging a date of injury of April 30, 2014, against Holiday Inn (File No. 5048705). This petition was against the same employer and a different insurance carrier. In that petition, claimant alleged permanent and total disability.

Deputy Walsh issued a decision finding claimant carried her burden of proof that she had a worsening of her condition proximally caused by the 2003 injury. In the decision, Deputy Walsh awarded claimant permanent and total disability benefits.

On August 25, 2015, the undersigned issued an appeal decision. That decision remanded the case back to the deputy level to be consolidated with File No. 5048705 (date of injury April 30, 2014). That remand indicated there were significant issues as to whether EMC, the insurer in the 2003 injury, or a subsequent insurance carrier, was liable for claimant's current condition.

Following that decision, claimant dismissed her petition for the April 30, 2014, date of injury (File No. 5048705) on September 9, 2015, making it impossible for consolidation to occur. Claimant's application for rehearing is based, in large part, on claimant's own actions in dismissing File No. 5048705.

The detailed arguments of the parties have been considered, and the record of evidence has been reviewed de novo.

Because this matter was initially remanded, on appeal, to the deputy level, as detailed above, this appeal was never reviewed on the merits of the case. As a result, this rehearing decision will be an appeal decision on the merits.

#### ISSUE

Did claimant sustain a change of condition proximately caused by the March 4, 2003, work injury not contemplated at the time of the 2007 settlement agreement that would entitle claimant to benefits under a review-reopening.

#### FINDINGS OF FACT

Claimant was an employee of Holiday Inn. On March 4, 2003, claimant slipped and had a lower back injury. This injury resulted in three surgeries. Claimant had a partial laminectomy and discectomy on October 27, 2004. (Ex. 1, p. 1) It was not successful. Claimant had a partial laminectomy on March 4, 2004. (Ex. 2, p. 1)

Claimant eventually underwent a third surgery on February 7, 2005. It was an L3-4 posterolateral fusion. Surgery was performed by Ernest Found, Jr., M.D. with the University of Iowa Hospitals and Clinics (UIHC). (Ex. 3, p. 1)

Claimant returned to work in June of 2005. She was limited to working six hours per day and allowed to work three days per week. Claimant was allowed to lift up to 30 pounds frequently and allowed to frequently twist, bend, stoop and squat. Claimant was not to lift over 30 pounds. (Ex. 7, p. 8)

In December of 2006 claimant was taking prescription medication consisting of acetaminophen, amitriptyline and Darvocet. As of April of 2007 claimant was also taking tramadol. (Ex. D, p. 10; Ex. 6, p. 2)

Dr. Found opined claimant had a 13 percent permanent impairment of the body as a whole. (Ex. 4, p. 5) In an independent medical evaluation (IME), Thomas Hughes, M.D., found claimant had a 23 percent permanent impairment of the body as a whole. (Ex. 6, p. 4)

On May 21, 2006, claimant alleged a right shoulder injury against defendant-employer from work. Claimant was treated by David Field, M.D. who opined claimant had a 10 percent permanent impairment of the right shoulder. Claimant filed a petition in arbitration regarding this injury, File No. 5019896 (date of injury May 21, 2006). In a June 23, 2007, arbitration decision claimant received a 10 percent industrial disability award. (Ex. 21) Claimant later filed a review-reopening decision regarding that injury. Claimant was awarded an additional 25 percent industrial disability on the review-reopening decision in July of 2009. (Ex. 29)

On September 24, 2007, the parties entered into an agreement for settlement in this case. The parties agreed claimant had a 75 percent industrial disability resulting from the March 4, 2003, work injury. The settlement agreement indicated, at the time of settlement, claimant was working in the laundry for defendant-employer earning \$8.76 per hour. She worked approximately 25 hours per week. The settlement agreement noted the restrictions, detailed above, were in effect at the time of settlement. (Ex. 7)

On April 21, 2008, claimant saw Joseph Garrity, M.D. with Tri-State Occupational Health. Claimant indicated she injured her low back on April 21, 2008, after pulling wet sheets and bedding from a washer. Dr. Garrity recommended home exercises and biometric training. (Ex. 11, p. 1)

Claimant returned for follow-up with Dr. Garrity on two occasions in April of 2008 in regards to the April 21, 2008, date of injury. (Ex. 10, pp. 3-11)

On May 21, 2008, claimant returned to Dr. Found. Claimant complained of worsening symptoms in her legs and lower back. A CT/myelogram was recommended. Dr. Found reviewed the CT/myelogram findings and noted nothing objective could be found to explain claimant's pain. He recommended against further surgery and continued claimant to working six hours a day every other day. (Ex. 9, pp. 7-13; Ex. E, p. 16)

Claimant testified at hearing she fell outside her home in July of 2008 when her left leg gave out. (Transcript p. 42)

On February 10, 2009, claimant was evaluated by Julie Muenster, ARNP. Claimant indicated she was pushing a cart, turned to walk and had left leg pain and fell to the ground. (Ex. 10, pp. 19-20)

Claimant returned in followup with Nurse Practitioner Muenster up through May of 2009 on several occasions for a February 10, 2009, date of injury. Claimant was returned to work doing seated work only. (Ex. 10, pp. 44-45)

Claimant alleged that on March 20, 2009, she went to get off a chair at work and began to walk when she fell to her knees. (Ex. 30, p. 9)

Claimant returned to Dr. Found on May 20, 2009. Claimant complained of shaking in her lower extremities. She also complained of continued low back and leg pain. Dr. Found had no explanation for claimant's leg shaking. He recommended an MRI and physical therapy exercises. (Ex. 9, pp. 21-22)

In a July 8, 2009, letter Dr. Found opined claimant's symptoms at the present were due to the March of 2003 injury. (Ex. 9, p. 26)

In a November 18, 2009, note, Dr. Found opined claimant had no additional permanent impairment to her spine as of May 20, 2009. (Ex. 9, p. 28)

On May 7, 2011, claimant settled her February 8, 2009 alleged work injury claim with the Holiday Inn and Liberty Mutual under an Iowa Code section 85.35(3) compromise settlement for \$10,000.00. (Ex. 30)

Claimant returned to Dr. Found on April 21, 2011, with complaints of lower back pain and pain in both legs. Claimant was assessed as having chronic lower back pain with no neurological findings for radiculopathy. Claimant told Dr. Found she believed she was unable to work six hours a day. Claimant was returned to work at four hours per day, three days per week. (Ex. 9, pp. 37-40)

Claimant was evaluated in the Pain Clinic at UIHC on October 24, 2011, by Esther Benedetti, M.D. Claimant had multiple areas of pain in the lower extremities that were not specific or consistent. Claimant was treated with medication and recommended to have an MRI and an EMG. (Ex. 9, pp. 40-42)

In a December 19, 2011, letter Dr. Found opined claimant's referral to Dr. Benedetti was related to the March of 2003 work injury. (Ex. 9, p. 45)

Claimant returned to Dr. Benedetti on February 1, 2012. Claimant's MRI and EMG were reviewed. EMG suggested an L5 radiculopathy. Facet injections and physical therapy were recommended. (Ex. 9, pp. 46-48)

Claimant returned to Dr. Benedetti in April or May of 2012. During this time claimant underwent facet injections. Claimant was also given a TENS unit. (Ex. 9, pp. 50-61)

On October 11, 2012, claimant returned to Dr. Benedetti with continued complaints of lower back and leg pain. Dr. Benedetti indicated claimant had not received sustained benefits from conservative therapies. A trial spinal cord stimulator was recommended. (Ex. 9, p. 67)

On December 12, 2012, Dr. Benedetti performed an implant of the trial spinal cord stimulator. (Ex. 9, p. 73) The trial spinal cord stimulator did not work, and it was later removed. (Ex. 9, pp. 82-83)

In March of 2013, claimant returned to Dr. Benedetti with continued complaints of back pain and leg pain. Branch blocks were performed. (Ex. 9, pp. 9-91) Claimant was discharged from the UIHC Pain Clinic on March 12, 2013. (Ex. 9, p. 91)

Claimant returned to Dr. Found on April 17, 2013. A CT/myelogram was performed. Claimant had increasing back and leg pain. Claimant indicated she was unable to work and had been off work for approximately two months. Claimant was kept off work by Dr. Found. (Ex. 9, pp. 98-110)

Claimant returned in follow-up to UIHC. Claimant believed her symptoms had worsened since removal of the spinal cord stimulator. Claimant was recommended to attend the spine rehabilitation program and receive physical therapy. Based on review of the CT/myelogram, which showed no neurological compression, fracture or hardware complications, surgery was not recommended. Dr. Found excused claimant from work until further notice. (Ex. 9, pp. 111-115)

In a July 13, 2013, letter, the Social Security Administration awarded claimant Social Security Disability benefits commencing in April of 2012. The award found claimant had been disabled as of January 1, 2007.

In a report dated October 3, 2013, Robin Sassman, M.D., gave her opinions of claimant's condition following an IME. Claimant complained of back pain. Claimant had pain in the legs bilaterally, left worse than right. Dr. Sassman opined claimant's symptoms had worsened since 2007. Dr. Sassman noted claimant's range of motion had decreased since she was evaluated by Thomas Hughes, M.D. Dr. Sassman recommended claimant continue physical therapy and pursue treatment in the spine rehabilitation program at UIHC. (Ex. 15, pp. 1-9)

Dr. Sassman found claimant to be at maximum medical improvement (MMI), as of April 17, 2013. Dr. Sassman found claimant had a 27 percent permanent impairment based on claimant's loss of range of motion, and the spinal fusion, using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Sassman limited claimant to rarely lifting 10 pounds and recommended against claimant carrying objects. (Ex. 15, pp. 9-11)

In a December 18, 2013, letter, Dr. Found assessed claimant as having chronic back pain of unclear etiology. He indicated he had not been able to find a clear cause for claimant's continued complaints. He noted:

... Her continued work may have allowed for a substantial aggravation of her underlying condition. However, her variety of complaints is not solely related to March of 2003. The events leading to

April of 2013 when she felt she was unable to work are difficult to define. They are not all related to March 4 of 2013.<sup>1</sup>

(Ex. 9, pp. 129-130)

Dr. Found opined claimant reached MMI as of April 2006, and her MMI date had not changed. He also found no change in impairment related to the March 2003 incident. (Ex. 9, pp. 129-130)

In a January 31, 2014, report, Dr. Sassman indicated she had reviewed the December 18, 2013, report from Dr. Found. Dr. Sassman believed claimant's condition had changed because: 1) Claimant now required three prescription medications where she required none in 2007; 2) Claimant indicated increased pain and decreased function; 3) Claimant had decreased range of motion. (Ex. 15, pp. 14-15)

In a report dated February 18, 2014, Richard Kreiter, M.D. gave his opinions of claimant's condition following an IME. He noted claimant had not sustained a change in medical condition of the fusion at the L3-4 level. He opined claimant's continued work most likely caused a substantial aggravation of her condition. He was unable to say within a reasonable degree of medical certainty that claimant's current condition was related to her March 4, 2003, work injury. (Ex. A)

In a February 21, 2014, letter, claimant was requested to return to work at Holiday Inn as of March 5, 2014, for six hours per day. (Ex. G, p. 34) Claimant did return to work at the Holiday Inn on March 5, 2014, and continued to work there through the date of hearing. (Ex. L, p. 64) Claimant testified at hearing she did not work a full six-hour day on March 5, 2014, March 7, 2014, March 11, 2014, March 17, 2014, and March 19, 2014. (Ex. 19, p. 1; Tr. pp. 58-59)

Claimant testified in deposition that working at the Holiday Inn has aggravated her lower back condition. (Ex. H, p. 37)

Claimant testified she has back pain radiating into both legs, left worse than right. (Tr. pp. 63-64) She testified she was not taking prescription medication at the time of her settlement agreement in 2007. (Tr. pp. 40, 45-46)

Claimant testified she has difficulty sleeping and doing housework due to back and leg pain. (Tr. 61, 68) She said she has difficulty driving a car for an extended period of time. (Tr. 66)

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<sup>1</sup> In the review-reopening, the deputy noted that the date, "March 4, 2013" was a typographical error and should read to be the date of March 4, 2003. (Review-Reopening Decision, p. 12) I agree with this construction of Exhibit 9, pages 129-130.

Claimant testified at the time of hearing that she did not believe she could work more than two to three hours at a time. (Tr. pp. 59, 61) She testified she did not believe she could return to work as a housekeeper at Holiday Inn. (Tr. p. 74)

### CONCLUSIONS OF LAW

The first issue to be determined is whether claimant has carried her burden of proof that she had a change in condition, proximately caused by her March 4, 2003, injury, which 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. 6.14(6).

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).

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).

In a review-reopening procedure 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).

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 workers' 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).

Claimant testified at hearing, that her symptoms in her leg and back have worsened since the 2007 agreement for settlement.

As noted in the finding of facts, claimant has had several traumatic injuries since the 2007 agreement for settlement. In April of 2008 claimant alleged a lower back injury which occurred while pulling laundry. (Ex. 11, p. 1; Ex. 30, p. 9) Records indicate claimant received medical treatment for an April 21, 2008, work injury. (Ex. 10, pp. 3-11) Claimant also received physical therapy for an April 21, 2008, work injury. (Ex. 11, pp. 1-6)

Claimant testified that in approximately July of 2008 she slipped outside her house when her legs allegedly gave out. (Tr. p. 42)

On February 8, 2009, claimant alleged she fell after trying to walk after pushing a laundry cart. Claimant received medical treatment and physical therapy on multiple dates for a February 8, 2009, date of injury. (Ex. 10, pp. 19-45; Ex. 11, pp. 7-15) Claimant eventually settled that date of injury claim, with defendant-employer and a different insurer, for \$10,000.00 under a compromise settlement. (Ex. 30)

Claimant alleges that on May 20, 2009, she had another fall at work when she tried to get off a chair. (Ex. 30, p. 9)

Three experts have opined regarding whether claimant's condition was worsened since her 2007 agreement for settlement, and if that alleged worsening condition was proximately caused by the 2003 work injury.



Dr. Found has treated claimant since 2004. He performed a fusion surgery on claimant. On a number of occasions Dr. Found has opined that ongoing treatment for claimant was causally related to the 2003 work injury. (Ex. 9, pp. 36, 45)

Claimant underwent at least two CT/myelograms, prescribed and reviewed by Dr. Found. On both CT/myelograms, taken in 2008 and 2013, Dr. Found could not see anything objectively in the testing to explain claimant's complaints. (Ex. 9, pp. 7-13, 98-115; Ex. E, p. 16)

In 2009 and 2013 Dr. Found opined claimant had no increased permanent impairment. (Ex. 9, p. 28, 129-130)

Dr. Found has noted claimant had no neurological findings to explain her radiculopathy. (Ex. 9, pp. 37-40) He has found no objective evidence to explain claimant's alleged leg shaking. (Ex. 9, pp. 21-22) Claimant has been assessed as having complaints of pain that were inconsistent. (Ex. 9, pp. 40-42)

In his December 18, 2013, opinion letter, Dr. Found assessed claimant as having chronic back pain of an unclear etiology and noted that through his years of treating claimant, he has been unable to find a clear cause for claimant's complaints. (Ex. 9, pp. 129-130) Dr. Found opined claimant's variety of complaints are not all related to the March 2003 injury. He also opined claimant's permanent impairment had not changed since 2007. (Ex. 9, pp. 129-130)

Claimant contends, in post-hearing briefs, Dr. Found's December 18, 2013, opinion is contradictory to prior opinions, and was a result of persuasion by defendants' counsel. (Claimant's Request for Rehearing, pp. 9-10)

It is true Dr. Found opined, on at least two occasions, treatment occurring in 2009 and 2011 was related to the 2003 fall. However, indicating treatment is related to the 2003 fall is far different than opining claimant's worsening condition is proximally caused by the 2003 injury. Dr. Found has indicated the opposite. He has consistently indicated there is little objectively to explain claimant's multiple symptoms. He has indicated at least twice that permanent impairment has not increased.

Dr. Kreiter evaluated claimant on one occasion for an IME. Dr. Kreiter agreed with Dr. Found. Dr. Kreiter opined claimant had not sustained a change in condition related to the fusion at L3-4. He opined claimant's continued work, not the 2003 incident, most likely caused a worsening of claimant's condition. (Ex. A)

Dr. Sassman evaluated claimant on one occasion for an IME. She opined claimant's condition worsened since the 2003 agreement for settlement based on: 1) Claimant was taking three medications in 2013, and was not taking any prescription medication in 2007. 2) Claimant complained of greater symptoms. 3) Claimant had a greater loss of range of motion. (Ex. 15)

As noted in the finding of facts, records suggest claimant actually was taking prescription medication approximately in 2007, including, but not limited to tramadol and Darvocet for pain. (Ex. D, p. 10; Ex. 6, p. 2) Claimant's complaints of pain are subjective complaints of pain. Dr. Sassman indicates claimant had an approximately four percent increase in permanent impairment, from April of 2007 until 2013, based on different range of motion studies. However, even the Guides recognize range of motion studies are subject to question regarding accuracy concerning standardization of methods and subjectivity of patients. (Guides at 593-597)

Dr. Sassman gave little analysis concerning the lack of objective findings concerning the two CT/myelograms. She offered no analysis regarding the impact of claimant's traumatic injuries in 2008 and 2009 had on her condition. She offers little analysis why claimant's 2003 injury is a proximate cause of her condition in 2013, given that claimant had at least four other traumatic injuries as described above. Dr. Sassman's opinion, that claimant was not using any prescription medication in 2007, appears incorrect. Based on these reasons, and as detailed above, it is found Dr. Sassman's opinions regarding the proximate cause of claimant's condition, and the alleged worsening of the condition, are found not convincing.

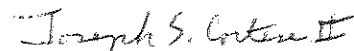
Claimant had at least four traumatic injuries affecting her lower back since the 2007 agreement for settlement. CT/myelograms failed to show any changes in her fusion or any neurological impact from that surgery. Dr. Found opined claimant's condition is not proximally caused by her 2007 injury. Dr. Found opined claimant's permanent impairment has not increased since 2007. Dr. Kreiter opined claimant's current condition was probably aggravated by her work, and not her work injury of 2003. Dr. Sassman's opinions regarding causation and worsening of condition are found not convincing. Based on these facts, and the others as detailed above, claimant has failed to carry her burden of proof that she had a worsening condition since her 2007 agreement for settlement. Claimant has also failed to carry the burden of proof that any alleged worsening condition is proximally caused by her 2003 injury.

#### ORDER

IT IS THEREFORE ORDERED that the proposed review-reopening decision of July 25, 2014, is reversed and claimant shall take nothing in additional benefits under review-reopening.

Claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed this 12th day of October, 2015.



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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

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