BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEANNE HINZ, Claimant, vs. UNITYPOINT HEALTH – ST. LUKE'S HOSPITAL, Employer, Self-Insured, Defendant.	:	File No. 5052769 REVIEW-REOPENING DECISION Head Note Nos.: 1402.40, 2905, 2907

FILED
JUN 27 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

DeAnne Hinz, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendant, UnityPoint Health – St. Luke's Hospital, self-insured employer. The hearing occurred before the undersigned on May 24, 2018, in Des Moines, Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. In the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration 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.

The evidentiary record consists of: Joint Medical Exhibits JE 1 through JE 7, Claimant's Exhibits 1 through 10, and Defendant's Exhibits A through F.

Claimant testified on her own behalf. No other witness testified. The evidentiary record closed on May 24, 2018. The case was considered fully submitted upon receipt of the parties' briefs on June 13, 2018.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a change in condition warranting an increase of the 24 percent industrial disability previously agreed upon by way of agreement for settlement.

    a. If so found, the extent of the increase of compensation.

b. If so found, whether claimant is entitled to penalty benefits for defendant's non-payment of permanency benefits.

2. Costs, including whether claimant is entitled to reimbursement for the remainder of Dr. Bansal's IME invoice.

FINDINGS OF FACT

After a review of the evidence presented, the undersigned finds as follows:

Claimant and the defendant entered into an Agreement for Settlement that was approved by this agency on March 23, 2017. In the settlement, the parties agreed that claimant sustained a compensable, work-related injury on January 6, 2015, that caused her to sustain a 24 percent industrial disability pursuant to Iowa Code section 85.34(2)(u). More specifically, through an attachment to the settlement documents, the parties stipulated and agreed that claimant sustained an injury to her right shoulder and right hand/wrist/arm (hereinafter "right arm") as a result of the January 6, 2015 injury.

Before entering into the settlement, claimant had already undergone two shoulder surgeries. The first surgery was performed by James Pape, M.D., on June 1, 2015, to repair claimant's biceps and rotator cuff. (JE 1:9) The second surgery, a distal clavicle resection and subacromial decompression, was performed by Matthew Bollier, M.D., on April 8, 2016. (JE 6:90) Dr. Bollier placed claimant at maximum medical improvement with respect to her right shoulder as of August 5, 2016, and returned her to work without restrictions. (JE 6:105) He later, on September 12, 2016, assigned a 10 percent whole body impairment based on deficits in claimant's shoulder range of motion. (Cl. Exhibit 3) Claimant never returned to Dr. Bollier for additional treatment to her shoulder. (Hearing Transcript pp. 47-48)

Claimant was evaluated by Sunil Bansal, M.D., for purposes of an independent medical examination (IME) on October 21, 2016. (Cl. Ex. 2:22) Dr. Bansal issued a report on November 23, 2016, in which he assigned an 11 percent whole body impairment based on deficits in claimant's shoulder range of motion and distal clavicle resection. (Cl. Ex. 2:31) He assigned restrictions of "no lifting greater than 20 pounds occasionally, or 10 pounds frequently with the right arm, along with no lifting more than 5 pounds above shoulder level or away from the body with the right arm occasionally." (Id.) Both Dr. Bollier's September 12, 2016 and Dr. Bansal's November 23, 2016 opinions were known and considered by the parties at the time of settlement.

Dr. Bansal performed another IME at claimant's attorney's request in December of 2017, though the corresponding report was not served until April 23, 2018. (Cl. Ex. 1) In his April 23, 2018 report, Dr. Bansal increased claimant's whole body impairment from 11 percent to 12 percent based on worsening deficits in claimant's shoulder range

of motion. (Cl. Ex. 1:8-10) He also opined that claimant was "no longer able to lift above shoulder level with the right arm." (Cl. Ex. 1:10)

However, contrary to Dr. Bansal's April 2018 report, claimant testified in her April 20, 2018 deposition that her shoulder symptoms were generally unchanged. More specifically, when asked how her current right shoulder symptoms compared with her symptoms at the time of the March 2017 settlement, she replied as follows:

> A. Nothing has changed.
>
> Q. So you would say since the March 2017 settlement nothing has changed? Your shoulder problems haven't gotten better or worse; they're just the same?
>
> A. Correct.

(Def. Ex. F:71 [Depo. Tr. p. 19])

Also contrary to Dr. Bansal's April 2018 report is a note from claimant's primary care provider, Kenneth Cearlock, M.D., dated March 28, 2018. Claimant told Dr. Cearlock at that appointment that her shoulder was "doing better" and that her symptoms had "improved." (JE 7:108) While claimant disputed the accuracy of other portions of Dr. Cearlock's note from the March 28, 2018 visit, she acknowledged that his memorialization with respect to her right shoulder symptoms was correct. (Hrg. Tr. pp. 52-53)

Dr. Bansal's opinion that claimant's shoulder condition worsened and required more limiting restrictions is also undercut by the fact that claimant neither requested nor received any additional treatment or modified restrictions for her right shoulder between March of 2017 when the agreement for settlement was approved and the hearing before the undersigned. (Hrg. Tr. pp. 47-48; Def. Ex. F:70 [Depo. Tr. pp. 16-17])

In light of claimant's own testimony that her right shoulder symptoms were unchanged since the March 2017 settlement, her report to Dr. Cearlock that her right shoulder symptoms had actually gotten better, and the fact that claimant has neither requested nor required additional treatment or modifications to her restrictions for her shoulder, Dr. Bansal's increased impairment rating and modified restriction relating to claimant's shoulder are not convincing. The greater weight of the evidence indicates claimant's shoulder condition has remained stable or even improved slightly since March of 2017. It is therefore found that claimant did not sustain a physical worsening of condition with respect to her right shoulder.

Claimant also sustained an injury to her right arm as a result of the January 6, 2015 accident, and she was continuing to receive treatment for those problems when the parties entered into their settlement. Claimant's right arm problems began when she noticed significant swelling and pain in her hand in the hours after her first shoulder surgery. (Hrg. Tr. pp. 22-23) After claimant's initial bout of conservative treatment

failed to alleviate her wrist pain, claimant was referred to Peter Pardubsky, M.D., for further evaluation. (JE 4: 42-56)

Claimant was evaluated by Dr. Pardubsky on January 12, 2017. He diagnosed claimant with De Quervain's tenosynovitis and right carpal tunnel syndrome. (JE 4:59) Claimant underwent a right carpal tunnel release and first dorsal compartment release on March 23, 2017, the same day the agreement for settlement was approved. (JE 1:16) Per the attachment to the settlement documents, the parties considered both claimant's March 23, 2017 surgery and claimant's right arm limitations when coming to their agreement.

By early June 2017, roughly two months after claimant's surgery and the agreement for settlement was approved, claimant had returned to regular work and was reporting only minimal discomfort in her wrist. (JE 4:69) At her follow-up appointment with Dr. Pardubsky on June 2, 2017, her condition, according to the doctor, was "significantly improved." (Def. Ex. A:3) Dr. Pardubsky placed her at MMI "without residual measureable impairment." (JE 4:70) Claimant was released from Dr. Pardubsky's care without any permanent restrictions relating to her wrist. (Id.) Claimant never returned to Dr. Pardubsky for treatment. (Hrg. Tr. p. 59)

In Dr. Bansal's April 23, 2018 report, he assigned a two percent upper extremity impairment based on claimant's digital sensory deficits. (Cl. Ex. 1:9) He also assigned a new restriction of "no frequent turning or twisting with the right hand." (Cl. Ex. 1:10)

However, contrary to Dr. Bansal's opinion regarding claimant's permanent impairment was claimant's own testimony at her April 2018 deposition and the review-reopening hearing before the undersigned. When asked at her deposition how the wrist surgery affected her symptoms, she replied as follows:

A. It helped in the sense that it's not a constant pain.

Q. Would it be fair to say that your right wrist and hand problems are better than they were prior to surgery?

A. Slightly.

(Def. Ex. F:72 [Depo. Tr. p. 23]) She later described her symptoms as "somewhat" improved. (Id.)

She testified similarly at hearing:

Q. And you would agree that your right wrist and hand problems are at least slightly - - are somewhat better now as compared to prior to surgery; is that correct?

A. Yes.

Q. You would agree that your pain symptoms are not as severe now as prior to surgery; is that correct?

A. Not as severe.

Q. So that would be correct?

A. Yes.

Q. You would say that your symptoms are even slightly better since June 17 when you were released by Dr. Pardubsky; is that correct?

A. Yes.

(Hrg. Tr. pp. 63-64)

She also testified her current condition is "[v]ery, very slightly" better than it was at the time of the settlement. (Hrg. Tr. p. 66)

Dr. Bansal's opinion that claimant needs work restrictions for her wrist condition was likewise undermined by claimant's testimony that her job, which she is currently able to perform, requires non-stop use of her right arm, including turning and twisting of her right wrist. (Hrg. Tr. pp. 85, 87)

In light of claimant's own testimony that her wrist symptoms are currently better than they were at the time of the March 2017 settlement and the fact that claimant has been working without restrictions or ongoing treatment relating to her wrist since June of 2017, Dr. Bansal's impairment rating and restriction relating to claimant's carpal tunnel and De Quervain's diagnoses are not persuasive. Dr. Pardubsky's opinion that claimant sustained no permanent impairment and requires no restrictions for her wrist is more consistent with the greater weight of the evidence. The undersigned acknowledges claimant had wrist surgery since signing the settlement papers, but a surgery, by itself, is not an automatic trigger to additional benefits, especially when claimant admits her condition was improved by the surgery. It is therefore found that claimant did not sustain a physical worsening of condition with respect to her right arm since the agreement for settlement.

Claimant's review-reopening petition also alleged injuries to her left shoulder, neck, back, and head. Claimant, however, produced no evidence supporting these claims. It is therefore found that claimant did not sustain a physical worsening of condition or sequela injury with respect to these additional body parts.

As a result, it is found that claimant's current physical condition does not warrant an increase of her compensation.

Claimant also asserts an economic worsening of condition. When claimant was hired by the defendant employer in mid-2014, she was making roughly 27 dollars per hour. (Hrg. Tr. p. 18) When her agreement for settlement was approved in March of 2017, claimant was earning roughly 28 dollars per hour. (Def. Ex. B:8; Cl. Ex. 8:69) Then, in January of 2018, claimant received a raise to 30 dollars per hour. (Hrg. Tr. pp. 36-37) Thus, claimant's hourly rate of pay actually increased in the relevant time period between her agreement for settlement and the hearing before the undersigned.

Claimant's actual earnings have also increased since her agreement for settlement was approved. Both claimant and defendant prepared charts to document claimant's earnings. Defendant calculated the following average weekly earnings: $1,166.94 at the time of the agreement for settlement and $1,277.33 at the time of the review-reopening hearing. (Def. Ex. B:8) Claimant's calculations were $1,167.48 ($1,344.76 / 14) at the time of the agreement for settlement and $1,378.67 ($19,301.44 / 14) at the time of the review-reopening hearing. (Cl. Ex. 8:57) Thus, using either party's calculations, claimant was actually earning more at the time of the review-reopening hearing than she was when she entered into the agreement for settlement.

Claimant acknowledged as much in her April 2018 deposition and at the hearing, testifying that her earnings have actually increased since March 2017 and that her overall economic condition is basically the same as it was at the time of her settlement. (Def. Ex. F:77 [Depo. Tr. p. 42]; Hrg. Tr. pp. 77, 82) Claimant additionally testified that she has picked up more hours in the 20 days leading up to hearing due to a change in staffing, meaning her actual earnings have recently increased. (Hrg. Tr. p. 78) For these reasons, it is found that claimant did not sustain an economic worsening of condition since entering into the agreement for settlement. It is therefore found that claimant's current economic condition does not warrant an increase of her compensation.

Even if claimant had successfully shown a slight worsening of her physical condition and/or economic condition, claimant's overall earning capacity and resulting industrial disability has not deteriorated since the March 2017 settlement to warrant an increase of compensation. When the agreement for settlement was approved, claimant was employed by the defendant employer doing the work of an intake coordinator, though she did not officially take on that title until the summer of 2015. (Hrg. Tr. p.p. 74-75) By early June of 2017, Dr. Pardubsky released claimant to return to her intake coordinator position with no restrictions relating to her wrist. (JE 4:71) She continued to do that job until October 1, 2017, when her job titled changed to "intake community nurse" due to a company-wide change—a change that had nothing to do with her work injury. (Hrg. Tr. p. 76) At the time of the review-reopening hearing, claimant continued to be employed with the defendant employer as an intake community nurse. (Hrg. Tr. p. 36)

Additionally, claimant's position merged with another position roughly 20 days before hearing, leaving claimant with additional responsibilities. (Hrg. Tr. p. 37) Although claimant testified she has noticed some increased pain over this 20-day period, she also testified she is able to perform the job with no real problems. (Hrg. Tr. p. 76) Ultimately, therefore, claimant has been performing and continues to perform work for which she is fitted.

As explained above in detail, claimant's current functional limitations and work restrictions are generally the same, if not slightly better, as they were at the time of the agreement for settlement. Although claimant testified at the hearing before the undersigned that her current physical condition would prevent her from returning to jobs requiring direct patient care, this is not a change; claimant admitted on cross-examination that she felt equally limited at the time she entered into the settlement. (Hrg. Tr. pp. 71-74; see Def. Ex. F:77 [Depo. Tr. pp. 43-44]) Claimant also acknowledged there is nothing she is currently unable to do that she was able to do at the time of the agreement for settlement. (Hrg. Tr. p. 71) Considering the above and all other appropriate factors related to industrial disability, it is found that claimant has not experienced a change in earning capacity to warrant increased compensation.

Because it is found that claimant is not entitled to additional permanency benefits, claimant's claim for penalty benefits is moot.

CONCLUSIONS OF LAW:

This is a review-reopening case. 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. Iowa Code § 86.14(2). 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).

The Iowa Supreme Court provided guidance on this change of condition requirement in Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009):

> In determining a scheduled or unscheduled award, the commissioner finds the facts as they stand at the time of the hearing and should not speculate about the future course of the claimant's condition. . . . [I]n an unscheduled whole-body case, the claimant's loss of earning capacity is determined by the commissioner as of the time of the hearing based on the factors bearing on industrial disability then prevailing—not based on what the claimant's physical condition and economic realities might be at some future time. See Iowa Code § 85.34(3); Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 157 (Iowa 1996) ("Factors that should be considered

include the employee's functional disability, age, education, qualifications, experience, and the ability of the employee to engage in employment for which the employee is fitted."); Second Injury Fund v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995) (stating "the concept of industrial disability rests on a comparison of what the injured worker could earn before the injury as compared to what the same person could earn after the injury"). The workers' compensation statutory scheme contemplates that future developments (post-award and post-settlement developments), including the worsening of a physical condition or a reduction in earning capacity, should be addressed in review-reopening proceedings. See Iowa Code § 86.14(2). 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).

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 [*sic*] physical capacity).

Therefore, we have held that awards may be adjusted by the commissioner pursuant to section 86.14(2) [then section 86.34] when a temporary disability later develops into a permanent disability, see Rose v. John Deere Ottumwa Works, 247 Iowa 900, 906, 76 N.W.2d 756, 759 (1956), or when critical facts existed but were unknown and could not have been discovered by the exercise of reasonable diligence at the time of the prior settlement or award, see Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968). We have also previously approved a review-reopening where an injury to a scheduled member later caused an industrial disability. See Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 13, 17 (Iowa 1993) ("[A] psychological condition caused or aggravated by a scheduled injury is to be compensated as an unscheduled injury.").

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)). Therefore, "once there has been an agreement or adjudication the commissioner, absent appeal and remand of the case, has no authority on a later review to change the compensation granted on the same or substantially same facts as those previously considered." Gosek, 158 N.W.2d at 732. For example, a "mere difference of opinion of experts or competent observers as to the percentage of disability arising from the original injury would not be sufficient to justify a different determination by another commissioner on a petition for review-reopening." Bousfield v. Sisters of Mercy, 249 Iowa 64, 69, 86 N.W.2d 109, 113 (1957). Likewise section 86.14(2) does not provide an opportunity to relitigate causation issues that were determined in the initial award or settlement agreement.

Kohlhaas, 777 N.W.2d at 392-393.

The supreme court in Kohlhaas thus identified five ways the change in condition review-reopening requirement can be satisfied: (1) a worsening of the claimant's physical condition; (2) a reduction of the claimant's earning capacity; (3) a temporary disability developing into a permanent disability; (4) a critical fact existed but was unknown or could not have been discovered by the exercise of reasonable diligence at the time of the prior settlement or award; or (5) a scheduled member injury later causes an industrial disability. See Verizon Business Network Services, Inc. v. McKenzie, No. 2-394/11-1845, (Ct. of App. October 17, 2012).

Based on the above findings of fact, it is concluded claimant failed to satisfy her burden to prove a change in condition warranting an increase of compensation so agreed upon. As explained above, claimant failed to show a worsening of her physical or economic condition, and she failed to prove that her industrial disability increased since the agreement for settlement. It is therefore concluded that claimant is not entitled to any additional benefits.

Because claimant failed to prove she is entitled to additional compensation, claimant's claim for penalty benefits is moot.

Costs

Claimant seeks the following costs: $97.95 (claimant's deposition); $100.00 (filing fee); and $6.74 (service fee). (Cl. Ex. 10) Claimant also seeks payment of the balance of Dr. Bansal's April 23, 2018 IME in the amount of $982.50. (The parties stipulated at hearing the defendant had already paid half of Dr. Bansal's $1,965.00 invoice.) (Cl. Ex. 9-10)

The assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. Rule 876 IAC 4.33.

Claimant's IME will be addressed first. Defendant argues it should not be taxed the remainder of Dr. Bansal's invoice because much of the IME report addresses claimant's shoulder, and claimant was already reimbursed for an earlier IME that addressed her shoulder and she has not received any treatment or updated impairment ratings since. (See Def. Ex. D:44)

With respect to the cost of the physical examination of claimant's shoulder, claimant failed to meet the prerequisites for reimbursement in Iowa Code section 85.39. Claimant received no additional care to her shoulder since August of 2016, and as a result no evaluation of permanent disability regarding claimant's shoulder was made by a physician retained by the defendant. Because there was no new employer-arranged evaluation of permanency for claimant's shoulder, the reimbursement provision in Iowa Code section 85.39 was not triggered. Claimant, therefore, is not entitled to reimbursement for the examination of her shoulder. See Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015); Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 861-62 (Iowa 2009).

The cost of Dr. Bansal's report will likewise not be taxed to defendant. For the reasons stated above, Dr. Bansal's report was not convincing, and claimant was not successful in showing a worsening of her shoulder condition. Claimant did not provide an itemization that defined the time Dr. Bansal spent on claimant's shoulder versus her wrist. Defendant's payment of one-half of Dr. Bansal's invoice (as it pertains to claimant's wrist condition) is reasonable.

Because claimant did not prevail on any issues, the undersigned declines to award her any of her remaining claimed costs.

ORDER

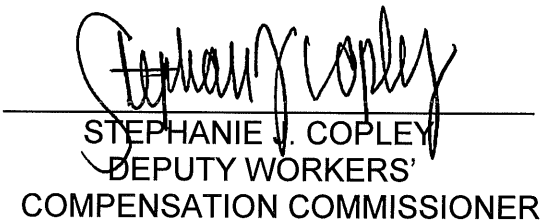
THEREFORE, IT IS ORDERED:

Claimant shall take nothing.

Each party shall pay their own costs.

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

Signed and filed this 27th day of June, 2018.



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SJC/kjw

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.