BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEBRA STUART, Claimant, vs. DICKTEN MASCH PLASTICS, LLC, Employer, and EMPLOYERS PREFERRED INS. CO., Insurance Carrier, Defendants.	File No. 5056493.01 REVIEW-REOPENING DECISION Head Notes: 1108.50, 1402.40, 2502, 2905, 2907

STATEMENT OF THE CASE

Debra Stuart, claimant, filed a petition in review-reopening of a prior settlement. Claimant is seeking additional workers' compensation benefits from Dickten Masch Plastics, LLC, employer and Employers Preferred Insurance Company, insurance carrier, as defendants.

The prior settlement the parties entered into was an Agreement for Settlement (AFS) which was approved by this agency on May 4, 2017. In that settlement, the parties stipulated that the appropriate weekly workers' compensation rate in this case is $403.38. The parties also stipulated claimant was entitled to permanent partial disability of 35 percent of the body as a whole resulting in 175 weeks of compensation under Iowa Code section 85.34(2)(u), as the result of the July 19, 2012, work injury.

Claimant filed a review-reopening petition on May 8, 2020, seeking an increase in her permanent disability award. This review-reopening proceeding came on for hearing before the undersigned on August 10, 2021.

This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the declaration of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

The parties filed a hearing report at the commencement of the arbitration hearing. On 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.

Debra Stuart, Karen Knox-Clinton, Rhonda Perkins, and Julie Svec all testified live at trial. The evidentiary record also includes Joint Exhibits JE1-JE4, Claimant's Exhibits 1-6, and Defendants' Exhibits A-I. Defendants filed an objection to Claimant's Exhibit 6 because it was untimely. Claimant's Exhibit 6 was admitted into evidence; however, the record was left open to allow defendants to have 30 days to submit any documentation concerning the alleged applications found in Claimant's Exhibit 6. Claimant objected to Defendants' Exhibit D as untimely. Defendants' Exhibit D was admitted into evidence; however, the record was left open to allow claimant to have 30 days to submit any rebuttal evidence. All other exhibits were received without objection. The evidentiary record was left open at the conclusion of the hearing; the hearing was held in recess. On September 8, 2021, defendants filed supplemental Exhibit I. No objections were received. Defendants' Exhibit I is admitted into the record.

The parties submitted post-hearing briefs on October 15, 2021, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant has established a substantial change in condition sufficient to justify a reopening of the May 4, 2017 Agreement for Settlement.

2. If claimant has established a substantial change in condition, whether the injury is a cause of additional permanent disability, including whether the odd-lot doctrine applies.

3. The appropriate commencement date for any additional permanent partial disability benefits.

4. Whether claimant is entitled to reimbursement of an Independent Medical Examination pursuant to Iowa Code section 85.39.

5. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Debra Stuart, claimant, sustained a work-related injury on July 19, 2012. Specifically, she sustained an injury to her left ankle resulting in an altered gait which caused pain in her lower back. (Def. Ex. E, p. 2, numbered paragraph 1) Ms. Stuart "underwent extensive treatment involving numerous surgeries in addition to appropriate conservative treatment. Unfortunately, the results were unfavorable, and she was left

with residual pain and restricted range of motion." (Def. Ex. E, p. 5) Following an appropriate amount of time, her treating physician, Daniel C. Miller, D.O., declared maximum medical improvement. The parties gathered expert opinions regarding permanent impairment and permanent restrictions. The parties entered into an AFS which was approved by this agency on May 4, 2017. As part of the AFS, the parties stipulated that as the result of the July 19, 2012 work injury, Ms. Stuart sustained permanent partial disability for thirty-five percent of the body as a whole.

Ms. Stuart's symptoms continued after the settlement. She continued to see Daniel Miller, D.O. for medication management. No further workup was recommended. The amount of pain medication Ms. Stuart is taking has decreased since the 2017 AFS. (JE2)

At the review-reopening hearing Ms. Stuart testified that her physical condition has worsened since the time of her settlement. She testified that her level of functioning has declined and that her pain levels have increased. Additionally, Karen Francine Knox-Clinton testified that Ms. Stuart is not as mobile as she was at the time of the AFS. Rhonda Perkins, claimant's sister, testified Ms. Stuart is less independent now than she was in 2017. (Testimony) However, a review of the objective medical evidence in this case does not support the subjective testimony.

Prior to the AFS, at the request of her attorney, Ms. Stuart underwent an independent medical evaluation (IME) with Jacqueline Stoken, D.O. in 2017. (Cl. Ex. 4) Prior to the review-reopening hearing, at the request of her attorney, Ms. Stuart underwent another IME with Dr. Stoken in 2021. (Cl. Ex. 1) In her reports Dr. Stoken documented Ms. Stuart's reported pain levels as follows:

Body Part	Reported pain level in 2017 (Cl. Ex. 4, p. 50)	Reported pain level in 2021 (Cl. Ex. 1, p. 6)
Back	7-8/10; average of 8	7-8/10; average of 8
Neck	7-8/10; average of 8	4-6/10; average of 4
Right shoulder	7-8/10; average of 8	3-5/10; average of 3
Right arm/wrist	4-5/10; average of 6	3-5/10; average of 4
Left hip	7-8/10; average of 8	Not addressed
Left leg	7-8/10; average of 8	5-8/10; average of 7

Based on the reports of Dr. Stoken, I find that Ms. Stuart's pain levels either remained the same or decreased from the time of the AFS until the time of the review-reopening hearing.

In the 2017 report Dr. Stoken noted that Ms. Stuart's current medications include "OxyContin 15 mg bid, oxycodone 5/325 mg twice a day, and Excedrin Migraine daily." (Cl. Ex. 4, p. 51) In the 2021 report Dr. Stoken noted that Ms. Stuart's current medications include "Oxycodone 5 mg 1-2 tablets every 6 hours." (Cl. Ex. 1, p. 7) I find that Ms. Stuart was taking fewer pain medications at the time of the review-reopening proceeding than she was at the time of the AFS.

A review of the "Functional Assessment Questionnaire" portion of Dr. Stoken's reports also does not support Ms. Stuart's contention that her level of functioning has declined. For example, in 2017 Ms. Stuart reported that it was "minimally difficult to drive." (Cl. Ex. 4, p. 51) In 2021 Ms. Stuart reported that she can "normally drive." (Cl. Ex. 1, p. 8) In 2017 Ms. Stuart reported it was "moderately difficult to do food prep, cook and eat, dress, tie her shoes and button her shirt, and sit for normal periods of time." (Cl. Ex. 4, p. 51) In 2021 Ms. Stuart reported it was "moderately difficult to sleep normally, do food prep, cook and eat, get up and down from a chair or bed, dress, tie her shoes and button her shirt." (Cl. Ex. 1, p. 8) I find Ms. Stuart's contention that her level of functioning has declined is not even supported by Dr. Stoken, a doctor that she selected.

In those same reports Dr. Stoken assigned permanent functional impairment ratings to Ms. Stuart as follows:

Body Part	Impairment Rating in 2017 (Cl. Ex. 4, pp. 52-53)	Impairment Rating in 2021 (Cl. Ex. 1, pp. 9-10)
Cervical	5 percent BAW	5 percent BAW
R. Upper Extremity	7 percent BAW	6 percent BAW
Low Back	5 percent BAW	5 percent BAW
L. Lower Extremity	12 percent BAW 1 percent BAW 1 percent BAW	12 percent BAW 1 percent BAW 2 percent BAW
Total Impairment[1]	28 percent BAW	27 percent BAW

Based on the reports of Dr. Stoken, I find that Ms. Stuart's functional impairment ratings either remained the same or decreased from the time of the AFS until the time of the review-reopening hearing.

In 2017 Dr. Stoken permanently restricted Ms. Stuart to work in a sedentary position 8 hours per day, 5 days per week as per the January 24, 2017 Functional Capacity Evaluation (FCE). (Cl. Ex. 4, pp. 53-54; Cl. Ex. 5) In 2021 Dr. Stoken permanently restricted Ms. Stuart to work in a sedentary position 8 hours per day, 5 days per week as per the May 19, 2021 FCE. (Cl. Ex. 1, pp. 10-11; Cl. Ex. 2)

Dr. Miller was Ms. Stuart's long-time treating physician; he saw Ms. Stuart before and after the AFS, on July 8, 2021. Dr. Miller opined that "there are no changes in my opinion, treatment plan, work or partial permanent impairment rating. Regarding work restrictions, it appears that she has had two valid FCE's (1/24/17 and 5/19/21) that have

[1] It is recognized that in the AFS the parties stipulated that Ms. Stuart sustained an injury to her left ankle resulting in an altered gait which caused pain in her lower back. (Def. Ex. E, p. 2, numbered paragraph 1) The parties did not stipulate she sustained work-related injuries to all the body parts rated. However, the ratings demonstrate that even an overall picture of her functional disability does not support her contentions.

placed her in a Sedentary Work Category. I agree with these FCE's." (JE2, p. 67) Ms. Stuart testified that Dr. Miller recommended that she use a walker as opposed to a cane. However, Dr. Miller's records are void of any such recommendation. His notes do refer to a cane, but there is no mention of a walker. (JE2)

On July 15, 2021, at the request of the defendants, William R. Boulden, M.D. performed an IME. After reviewing the records and examining Ms. Stuart, Dr. Boulden issued a report. He noted that since 2017 Ms. Stuart had been seeing Dr. Miller for medical management and that there had been no further workup. Ms. Stuart reported to Dr. Boulden that she was having the same problems that she had before. She did not report increasing problems with her back or left ankle. (Def. Ex. D, p. 9) Ms. Stuart testified that Dr. Boulden recommended she use a standup walker. However, there is no mention of any type of walker in Dr. Boulden's report. He did note Ms. Stuart was using a cane. (Def. Ex. D, p. 11) Dr. Boulden stated:

> After reviewing the records that I was asked to review and going through her history with her, there is nothing she wanted to add. Her conclusion, basically, is that she has not changed since her settlement of May/June 2017. I think this is straightforward and in her own words, she says she is the same as she was in 2017. It was noted that her IMEs have not really changed significantly and, in fact, she has improved some of her disability rating in 2021. She is still at sedentary status, which she was prior to this, and she has decreased her narcotic usage. It is, therefore, my opinion that she has not had any worsening of her problems with her ankle or her back.

(Def. Ex. D, p. 12)

Based on the totality of the medical opinions in this case, I find that Ms. Stuart's functional impairment ratings have either remained the same or decreased from the time of the AFS until the time of the review-reopening hearing. I further find Ms. Stuart's permanent restrictions remained unchanged from the time of the AFS until the time of the review-reopening hearing. I find that the totality of the record does not support Ms. Stuart's contentions that her work-related conditions have worsened or deteriorated since the time of the AFS.

Ms. Stuart also contends that her economic condition has worsened since the time of her settlement and that the change is related to the work injury. At the time of the AFS, Ms. Stuart was still employed with Dickten Masch Plastics, LLC. She was not working in the lead operator position that she had at the time of the injury. Rather, at the time of the AFS, she was working in a less physically demanding job inspecting light parts. Other employees would bring boxes to her and stack them up so she could inspect the parts. If a co-worker was not available, Ms. Stuart would take the chair the company provided her and wheel over to the box and then use her cane to drag the box across the floor to her workstation. She was allowed to get up and walk around after working thirty to forty-five minutes to take a break. Other employees were not allowed to take these types of breaks. According to Ms. Stuart, she was working in a position that had been created for her to accommodate the restrictions she had as the result of

the work injury. She worked in this position for 8 hours per day, 5 days per week. She was in this position at the time of the AFS and remained in that position until the plant closed in April 2020. (Testimony) I find Ms. Stuart's employment ended because the plant she worked at closed and all the employees lost their jobs. I further find that the termination of her employment was not related to the original July 19, 2012 work injury. I find she has not sustained an economic change of condition due to the July 19, 2012 work injury.

Claimant also seeks reimbursement of Dr. Stoken's June 1, 2021 independent medical evaluation charges. 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. Claimant sought an impairment rating from Dr. Stoken on June 1, 2021. (Cl. Ex. 1) Defendants did not seek an evaluation of permanent disability until July 8, 2021 and July 15, 2021. (JE2, pp. 66-67; Def. Ex. D) Thus, I find that defendants did not obtain a medical report from any physician regarding permanent impairment after the AFS and before Dr. Stoken's June 1, 2021 IME.

Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or at the discretion of the deputy hearing the case. I find that claimant was not successful in her case and exercise my discretion and do not assess costs against defendants. Each party shall bear their own costs.

Because claimant failed to demonstrate that she sustained a change of condition all other issues are rendered moot.

CONCLUSIONS OF LAW

Claimant brings this review-reopening proceeding. A review-reopening proceeding is appropriate whenever there has been a substantial change in condition since a prior arbitration award or settlement. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). Under Iowa Code section 86.14(2), this agency is authorized to reopen a prior award or settlement to inquire about whether the condition of the employee warrants an end to, diminishment of, or increase of compensation. Id.

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 since the time of the initial award or settlement. 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 Iowa Supreme Court has addressed situations where a claimant returns to work with an accommodation. The Court stated:

> We note that when a settlement is reached in a worker's compensation case, the injured's loss of earning capacity is properly viewed "in terms of the injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer."

See US West Communications, Inc. v. Overholser, 566 N.W.2d 876 (1997)(citing Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995)).

A review-reopening proceeding is not a reevaluation of the facts and circumstances that were known at the time of the original settlement. See Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009).

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).

Having determined that claimant's physical condition has not worsened or deteriorated since the time of the initial award, I conclude that Ms. Stuart has not proven that she sustained a substantial change in her physical condition that is related to the original injury. Therefore, I conclude that Ms. Stuart has not established entitlement to reopening or increase of her prior industrial disability award due to a physical change of condition. Iowa Code section 86.14(2).

Claimant also contends that she sustained an economic change of condition due to the work injury. Ms. Stuart has demonstrated that her economic condition has changed since the AFS. However, I found the reason that her employment ended was because the entire plant closed and this was not related to the original work injury.

Furthermore, claimant's argument that termination from an accommodated job amounts to a change of condition is not persuasive. In support of her position Ms. Stuart relies on Gallardo v. Firestone Tire & Rubber Co., 482 N.W.2d 393 (1992). However, the Gallardo case is distinguishable from Ms. Stuart's case because Mr. Gallardo's condition deteriorated after the time of the initial award. In Ms. Stuart's case, her condition did not deteriorate after the time of the AFS. At the time of the AFS, the parties entered into several stipulations including the amount of Ms. Stuart's loss of earning capacity. At that time, the injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer was to be taken into account. Although Ms. Stuart lost her job since the AFS, the facts and circumstances related to her earning capacity remain the same and were known at the time of the original settlement. I conclude Ms. Stuart has failed to demonstrate by a preponderance of the evidence that she sustained an economic change of condition related to the work injury.

Claimant also seeks reimbursement of Dr. Stoken's June 1, 2021 independent medical evaluation charges. 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).

In the review-reopening setting, defendants do not owe an independent medical evaluation unless they have obtained another permanent impairment rating from a physician of their own choosing since the prior award or settlement. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). In this case, I found that defendants did not obtain a medical report from any physician regarding permanent impairment after the AFS and before Dr. Stoken's June 1, 2021 IME. I conclude that claimant failed to establish entitlement to reimbursement of Dr. Stoken's independent medical evaluation pursuant to Iowa Code section 85.39.

Finally, each party submits a statement of costs and seeks reimbursement of those costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40.

Based on the above findings of fact, I exercise the agency's discretion and I conclude that each party should bear its own costs.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing further from these proceedings.

Each party shall bear their own costs.

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 9th day of February, 2022.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John Dougherty (via WCES)

Nathan McConkey (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.