BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MEGGAN STANTON n/k/a MEGGAN HEALY,		File No. 5039363
Claimant,		
vs.		
GUTTENBERG CARE CENTER,		REVIEW-REOPENING DECISION
Employer,		
MIDWEST EMPLOYERS CASUALTY COMPANY,		
Insurance Carrier, Defendants.		Head Note Nos.: 1803, 2905, 2907

FILED
FEB 21 2019
WORKERS COMPENSATION

STATEMENT OF THE CASE

Meggan Healy, claimant, filed a petition for review-reopening on December 2, 2015. Claimant seeks an increase in a prior arbitration award resulting from an Arbitration Decision entered by another deputy workers' compensation commissioner on August 5, 2014. In the prior Arbitration Decision, the presiding deputy commissioner awarded claimant a 30 percent industrial disability. Claimant now seeks an increase in the industrial disability award. Defendants contend that claimant's condition has not changed and may have improved since the 2014 Arbitration Decision.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The parties requested that the undersigned take administrative notice of the prior hearing transcript and exhibits. The undersigned agreed to take administrative notice of the prior evidentiary record. The remainder of the evidentiary record in this review-reopening proceeding includes Joint Exhibits 16 through 21, Claimant's Exhibits 22 through 25, and Defendants' Exhibits A through I.

Claimant testified on her own behalf. No other witnesses testified live at the time of the review-reopening hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The parties simultaneously served their post-hearing briefs on January 21, 2019, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a substantial change in condition that warrants an increase in her industrial disability award.

2. The extent of claimant's entitlement to any additional industrial disability benefits.

3. Whether claimant is entitled to award of the expenses of her independent medical evaluation pursuant to Iowa Code section 85.39.

4. Whether costs of this contested case proceeding should be awarded against any party and, if so, the extent of reimbursement that should be ordered.

The hearing report identifies additional medical issues as disputes. However, the parties were able to work out an agreement pertaining to payment of a past MRI and agreed that they likely could work out agreements as to past medical expenses. Therefore, the undersigned ordered defendants to pay the MRI they agreed to pay at the time of hearing and bifurcated all other medical benefits, including past medical expenses and medical mileage. Claimant will be permitted to bring a separate contested case proceeding to address the medical issues, if the parties cannot reach amicable resolution of the past medical expense issues.

FINDINGS OF FACT

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

The parties presented significant evidence as to claimant's condition at the time of the January 6, 2014 arbitration hearing. While the evidence presented provided the undersigned some context about the case, the undersigned is bound by and hereby adopts the findings of fact set for by the previous deputy commissioner in the August 5, 2014 arbitration decision as to claimant's medical and physical status at the time of the arbitration hearing.

One issue argued by the parties in this review-reopening proceeding was the status of claimant's symptoms and functional abilities at the time of the arbitration hearing. The prior deputy commissioner did not provide specific credibility findings pertaining to the doctors' opinions or provide specific findings as to the level of claimant's permanent impairment. However, it is noted that there is a finding in the

Arbitration Decision that Chad Abernathey, M.D., issued a 10 percent permanent impairment and Robin L. Sassman, M.D., issued a 13 percent permanent impairment rating. The prior deputy appeared to critique Dr. Abernathey's impairment rating, but did not specifically reject it or accept Dr. Sassman's impairment rating. Nevertheless, it is apparent that claimant's permanent impairment at the time of the arbitration hearing was somewhere in the 10 to 13 percent whole body range. (Arbitration Decision, pp. 12, 15)

The prior deputy commissioner found that claimant was only capable of lifting 30 pounds on an occasional basis at the time of the arbitration hearing. (Arbitration Decision, p. 16)) Claimant was found to require only Tylenol and Ibuprofen for management of her symptoms at the time of the arbitration hearing. (Arbitration Decision, p. 15) Claimant could only sit for 20 to 25 minutes without increased pain and struggled to walk more than a quarter of a mile. (Arbitration Decision, p. 15)

The prior deputy commissioner found that Ms. Healy was a motivated, younger worker. She specifically contemplated and found that "[r]etraining is possible" for Ms. Healy. (Arbitration Decision, p. 16) The prior deputy commissioner also documented that claimant's symptoms at the time of the arbitration decision were located in her low back and down her right leg. (Arbitration Decision, p. 16)

Ms. Healy presented credible testimony at the review-reopening hearing. Some of her testimony demonstrated improvement from the time of the arbitration hearing while other factors demonstrated worsening of her condition. For instance, Ms. Healy testified that she now has pain down her left leg all the way into her foot. This is clearly a new symptom or development since the arbitration hearing. This is good evidence of a worsening of her condition.

Claimant also testified that she now requires the use of oxycodone to manage her pain symptoms. As the prior deputy commissioner found, Ms. Healy required only over-the-counter medications to manage her symptoms at the time of the arbitration hearing. Again, this is convincing evidence that Ms. Healy's condition has substantially worsened since the arbitration hearing.

With respect to permanent work restrictions, Ms. Healy testified that she has continued to utilize and stay within a 30-pound lift limit since the arbitration hearing. There is some evidence of worsening in an independent medical evaluation performed by Dr. Sassman, who would now tighten the work restrictions. There is also deposition testimony from Ms. Healy and medical evidence that Ms. Healy operates under a self-imposed 40-pound lift restriction since the arbitration hearing. Realistically, claimant's functional lifting abilities are essentially the same as they were at the time of the arbitration hearing. This factor demonstrates no significant improvement or worsening of claimant's condition since the arbitration hearing.

The prior deputy commissioner noted that claimant sustained a 26 percent decrease in her actual earnings after the date of injury and at the time of the arbitration hearing. Defendants now demonstrate that claimant has experienced a significant increase in her earnings since the arbitration hearing and now earns more per hour than she did at the time of the arbitration hearing. In fact, at the arbitration hearing, claimant earned $10.00 per hour. She is now earning $14.50 per hour.

Claimant's increase in earnings arguably demonstrates that she has increased earning capacity since the arbitration hearing. However, this increase in wages is really the result of claimant's motivation and her continued education and training. Since the arbitration hearing, Ms. Healy has obtained additional education and become nationally certified as a medical assistant. The prior deputy commissioner contemplated claimant's ability to retrain, her age, and her motivation in the arbitration decision.

The fact that Ms. Healy now earns more than she did at the time of the arbitration hearing is not, standing alone, sufficient to defeat her review-reopening claim. Rather, the prior deputy commissioner anticipated that claimant may seek additional education and training and accounted for that in her industrial disability factors and award. Claimant's ability to accomplish this was contemplated and she has earned her way back to a wage she had prior to the work injury. However, this is not evidence that she is improved or has greater earning capacity than was estimated or foreseen at the time of the arbitration hearing. Rather, it is a manifestation of the claimant's motivation and cognitive abilities, as recognized by the deputy at the arbitration hearing.

Ms. Healy has put into evidence an updated independent medical evaluation from Dr. Sassman. Dr. Sassman now opines that claimant has a 26 percent impairment of the whole person. Some of the change in Dr. Sassman's impairment rating is accounted for by the fact that she now uses the range of motion methodology to rate claimant, as opposed to using the diagnosis based estimate methodology she used in her first evaluation of claimant. Nevertheless, the ranges of motion documented by Dr. Sassman worsened between her first and second evaluations. Given that Dr. Sassman's first evaluation occurred before the arbitration hearing and the second evaluation occurred after the arbitration hearing, this change in range of motion and permanent impairment is good evidence of a substantial change in condition since the arbitration hearing. I find that Dr. Sassman credibly demonstrates that claimant has sustained an increased impairment rating.

Defense counsel took Dr. Sassman's deposition and astutely pointed out several facts that Dr. Sassman was not aware of when re-evaluating claimant. Nevertheless, it appears that Dr. Sassman identified significant changes in claimant's condition, including decreased ranges of motion and the current need for opioid medications to control symptoms as opposed to over-the-counter medications at the time of the arbitration hearing. Again, I find that Dr. Sassman's opinion credibly demonstrates a substantial change in claimant's condition since the arbitration hearing.

Defendants introduced evidence that demonstrates some functional increases since the arbitration hearing. For instance, at the time of the arbitration hearing, claimant was only able to sit for approximately 20-25 minutes without increase in symptoms. She has since worked for employers that required her to travel up to one hour each way to get to and from work. At the time of the review-reopening hearing, claimant was working for an employer that required her to travel 45 minutes each way to and from work. Claimant's ability to sit for extended periods appears to have improved since the arbitration hearing.

Defendants introduced evidence that claimant experienced a significant, 75 percent, decrease in her symptoms and improvement of her functional abilities after implantation of the spinal cord stimulator. This evidence suggests a potential decrease in claimant's industrial disability. However, it really represents the masking of symptoms provided by the spinal cord stimulator, rather than some type of physical improvement. The improvement identified by defendants also does not account for the development of new symptoms in claimant's left leg and left foot or the development of the need to use narcotics to control her symptoms.

Considering claimant's current condition, symptoms, impairment, medical restrictions, ongoing motivation to continue working, her educational background, employment history, and the factors pertaining to her increased symptoms and use of narcotics, I find that Ms. Healy has proven a substantial change in condition since the arbitration hearing. While acknowledging the competing factors and facts presented by defendants, I specifically find that Ms. Healy has developed left leg symptoms that now radiate to her left foot. She has required implantation of a spinal cord stimulator since the arbitration hearing, and she now requires the use of narcotics to control her symptoms. She has demonstrated a worsening of her condition that warrants reconsideration of her industrial disability.

In support of an increased industrial disability award, claimant introduced a vocational report from Barbara Laughlin. I find many erroneous assumptions contained within Ms. Laughlin's report and accord it no weight in my analysis.

First, Ms. Laughlin assumes that claimant will proceed with a lumbar fusion. (Claimant's Ex. 24, p. 5) ("She will have a fusion on her lower back as well as her cervical spine. Dr. Reddy is performing her cervical fusion at C5-6 and C6-7 on January 25th, 2017. She will see Dr. Abernathey in the near future to discuss a lower back fusion.") This assumption was not borne out by the medical evidence or reality. Ms. Healy has not received a lumbar fusion and Ms. Laughlin was not qualified to make that diagnosis or recommendation. Her assumption was simply medically inaccurate.

Ms. Laughlin stated:

> Ms. Healy will have difficulty locating employment that does not allow her the significant accommodation she currently receives. She would be unable to maintain employment without that accommodation and it is likely

> many employers would not give her those accommodations. Ms. Healy is reduced to sedentary work by Dr. Sassman, in itself a reduction to only 11% of all job titles. In order to be able to work, Ms. Healy returned to school and obtained another degree.

(Claimant's Ex. 24, p. 10)

This opinion has significant errors as well. First, I found that Ms. Healy has continued to work under a 30-pound lifting limitation. She clearly has performed work above the sedentary level assumed by Ms. Laughlin. This erroneous assumption results in a significant overstatement of claimant's vocational loss.

Ms. Laughlin asserts that in order to be able to work, Ms. Healy had to obtain further education and another degree. While Ms. Healy did return for further education and obtain certification as a medical assistant, she quit active employment to pursue that education. She was employed at the time she elected to pursue further education. Ms. Laughlin underestimates claimant's ability to work without the subsequent education and degree.

Ms. Healy worked at Dollar General at the time of the arbitration hearing and quit for reasons unrelated to her injuries. She obtained subsequent employment and quit that employment to return for further education. Claimant was clearly capable of working with or without further education and certification. Ms. Laughlin's assertion to the contrary is simply factually unfounded and rejected.

Ms. Laughlin also asserts that claimant would not be able to maintain her employment or find alternate employment as a medical assistant without significant accommodations by her employer. Ms. Laughlin authored her report on January 15, 2017. Subsequent to authoring that report, Ms. Healy underwent her unrelated cervical fusion and lost her job when her FMLA leave expired. In direct contradiction of Ms. Laughlin's predictions, Ms. Healy was able to secure subsequent employment as a medical assistant with Gunderson Palmer Lutheran Hospital. She subsequently quit that employment and began working for Dubuque OB/GYN clinic.

Contrary to Ms. Laughlin's predictions, Ms. Healy has held consistent employment as a medical assistant, other than when unable to do so as a result of her unrelated cervical condition. Ms. Healy has obtained two different positions as a medical assistant since Ms. Laughlin's predictions that she likely would not be able to find similar work. Ms. Laughlin's assumptions, predictions, and opinions are found to be not credible because they are at variance with actual developments after her opinions were authored. I give Ms. Laughlin's opinions no weight in this case.

On the other hand, defendants have appropriately pointed out that she now earns more than she did even on the date of injury and 45 percent more than she did at the time of the arbitration hearing. Claimant's work restrictions for lifting remain the same as at the time of the arbitration hearing and claimant is clearly capable of sitting

for longer periods of time than she did at the arbitration hearing. Yet, claimant's development of left leg symptoms and need for narcotics demonstrate that claimant is marginally functionally worse now than at the arbitration hearing.

Considering claimant's age, current 26 percent impairment rating, permanent work restrictions, motivation level, educational background, employment history, increased skills and training since the arbitration hearing, use of narcotic medications, the situs and severity of her injuries, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that claimant has proven a 10 percent increase in her industrial disability since the arbitration hearing. I specifically find that claimant has proven a 40 percent loss of future earning capacity at the present time, or an increase of 10 percent since the arbitration hearing.

CONCLUSIONS OF LAW

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 section 86.14(2).

The Iowa Supreme Court has held that a claimant does not need to prove that the change in the condition was not contemplated at the time of the original decision(s). Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). However, the party bringing the review-reopening proceeding has the burden of showing that the employee's condition has changed since the original award or settlement was made and that that change in condition relates back to the original injury. 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 is not sufficient to justify a different determination on a petition for review-reopening.

To establish a compensable review-reopening claim, claimant must prove by a preponderance of the evidence that the current condition is causally related to the original work injury. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009). The principles of res judicata apply, and the agency should not reevaluate facts and circumstances that were known or knowable at the time of the original action. Id.

In this case, the parties presented competing evidence that demonstrated a potential increase in claimant's industrial disability, a potential decrease in her industrial disability, or evidence that there is no significant change in the industrial disability. Having considered and weighed that competing evidence, I found that Ms. Healy proved a substantial change in her condition that resulted in a marginal worsening of her industrial disability. Specifically, I found that Ms. Healy proved a 40 percent loss of future earning capacity at the present time. This is equivalent to a 40 percent industrial disability. A 40 percent industrial disability entitles claimant to an award of 200 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

The arbitration decision found that claimant proved a 30 percent industrial disability. Defendants have already paid the 30 percent industrial disability award and are entitled to a credit for payment of those benefits. Therefore, claimant has proven a 10 percent increase in her industrial disability since the arbitration hearing. This entitles her to an award of an additional 50 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Ms. Healy also asserts a claim for reimbursement of her independent medical evaluation pursuant to Iowa Code section 85.39. Specifically, claimant requests reimbursement of Dr. Sassman's $3,100.00 charge.

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).

However, claimant must establish the pre-requisites of Iowa Code section 85.39 to establish entitlement to reimbursement. "An employer ... is not obligated to pay for an evaluation obtained by an employee outside the statutory process." Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 844 (Iowa 2015).

In this case, claimant obtained an evaluation by Dr. Sassman, which provided an updated impairment rating. She contends that defendants obtained two reports from Dr. Abernathey, suggesting no change in claimant's clinical presentation. Claimant contends that those reports are "equivalent" to an impairment rating. However, defendants did not actually obtain an updated permanent impairment rating in this review-reopening proceeding.

I do not construe Dr. Abernathey's medical notes to be an attempt to provide an updated permanent impairment rating. He clearly knows how to render an impairment rating, having done so before the arbitration hearing. If defendants had asked for an impairment rating, Dr. Abernathey could have provided one. Therefore, I find that defendants did not obtain a permanent impairment rating before claimant's evaluation with Dr. Sassman. I conclude that claimant cannot establish the pre-requisite of Iowa Code section 85.39. Claimant has not established entitlement to reimbursement for Dr. Sassman's evaluation under Iowa Code section 85.39. Id.

Finally, Ms. Healy requests costs be assessed against defendants. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant has prevailed on her review-reopening claim and obtained a marginally higher industrial disability award. Therefore, I conclude that it is appropriate to assess claimant's costs in some amount.

Mr. Healy seeks assessment of her filing fee ($100.00). This is appropriate and assessed against defendants pursuant to 876 IAC 4.33(7). In her post-hearing brief, claimant seeks assessment of the functional capacity evaluation (FCE) report from Short Physical Therapy dated November 21, 2016. Review of the invoice from Short Physical Therapy demonstrates that the therapist charged $350.00 for drafting his report.

The Iowa Supreme Court has made it clear that only the charges for drafting a report in lieu of testimony are taxable costs pursuant to 876 IAC 4.33(6). Although I did not specifically rely upon the FCE in this decision, it was reasonable evidence to obtain and did suggest a change in claimant's condition. Therefore, I conclude it is reasonable to tax the cost of the FCE. However, I conclude that it is not permissible to tax the cost of the FCE, only the cost of the report. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845-846 (Iowa 2015). Therefore, I conclude it is appropriate to tax defendants with $350.00 in costs pursuant to 876 IAC 4.33(6) for the FCE report.

Finally, claimant also seeks taxation of Ms. Laughlin's vocational report. While a vocational report could be reasonable evidence to submit in a review-reopening proceeding, I did not rely upon or find Ms. Laughlin's report and opinions to be helpful. I conclude that this requested cost should not be taxed against defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant an additional fifty (50) weeks of permanent partial disability benefits commencing on December 2, 2015.

All weekly benefits shall be paid at the stipulated rate of three hundred twenty-six and 45/100 dollars ($326.45) per week.

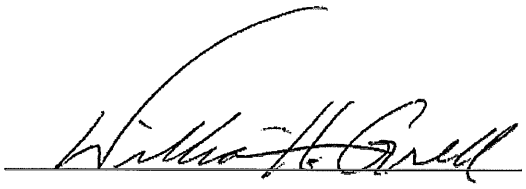
The employer and insurance carrier shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall receive credit for all weekly benefits paid to date.

Defendants shall reimburse claimant four hundred fifty dollars ($450.00) in costs.

Defendant 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 21st day of February, 2019.



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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.