BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DOUGLAS KEITH BRONSTINE,

Claimant,

vs.

HENNIGES AUTOMOTIVE HOLDINGS, INC.,

Employer,

and

TRAVELERS INDEMNITY CO. OF CT,

Insurance Carrier,
Defendants.

File No. 5045205

REVIEW-REOPENING

DECISION

Head Note Nos.: 1803; 2905

STATEMENT OF THE CASE

Claimant, Douglas Bronstine, filed a petition in review-reopening seeking workers' compensation benefits from Henniges Automotive Holdings, Inc., employer, and Travelers Indemnity Company of Connecticut, insurance carrier, both as defendants, as a result of a stipulated injury sustained on March 10, 2011. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch. The record in this case consists of joint exhibits 1 through 2, claimant's exhibits 1 through 5, defendants' exhibits A through I, and the testimony of the claimant, Connie Bronstine, Shelly Curren, and Angela Profetta.

ISSUES

The parties submitted the following issues for determination:

1. Whether there has been a change of condition since the agreement for settlement approved on May 30, 2014, that might entitle claimant to additional permanent disability benefits under a review-reopening;
2. If a change in condition is established, the extent of claimant's industrial disability; and
3. Commencement date for awarded permanent disability benefits.

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.

FINDINGS OF FACT

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

Claimant's testimony was clear and consistent as compared to the evidentiary record, deposition testimony, and the testimony of the remaining witnesses at evidentiary hearing. His demeanor at the time of evidentiary hearing was excellent and gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 61 years of age at the time of hearing. He and his wife, Connie Bronstine, have been married for 40 years. Claimant's formal education consists of completion of 11th grade. Claimant attended one-half of his senior year of high school, but dropped out when he was advised he did not have the requisite grades to graduate. At that time, claimant had already been held back twice due to his grades. He subsequently attempted to obtain his GED, but was unable to pass the tests. Claimant did obtain a welding diploma in 1975. (Claimant's testimony)

Claimant's post-high school work history consists of production and welding jobs. At his first employer, claimant worked approximately six weeks before sustaining injury when caught in a conveyor belt. After recuperating, claimant worked as a welder on propane tanks for two years. Claimant then began his employment at defendant-employer in August 1978. He has remained employed at defendant-employer consistently for nearly 40 years. Defendant-employer manufactures rubber weather stripping for vehicles; claimant held a number of production positions during the course of his employment. He described his work duties at defendant-employer as physical, requiring bending and lifting. (Claimant's testimony)

On March 10, 2011, claimant was working as a warehouse attendant in the box making position. His duties required him to make and stack boxes and skids. In performance of his duties, claimant turned and felt a pop in his back. He reported the injury to the nurse and was referred for medical care. (Claimant's testimony) At the time of claimant's injury on March 10, 2011, claimant earned $14.30 per hour. (Claimant's testimony; DEG; DEH)

Claimant underwent conservative care, including injections, without relief. Claimant's care was ultimately transferred to Paul Ostby, PA-C of Fort Madison Physicians & Surgeons Orthopedics & Sports Medicine. Conservative treatment continued. (Claimant's testimony) Claimant was also seen by neurosurgeon, Chad Abernathey, M.D., but surgery was not recommended. (See CE2, p. 4)

In order to avoid heavy work, in January 2012, claimant bid into the position of secondary operator in the service order area at defendant-employer. Claimant testified this position offered minimal overtime, as compared with the overtime availability in the remainder of the plant. Duties in this area vary and include running presses and machinery, as well as packing items. Claimant testified in this position, he was able to avoid much of the lifting and bending required in previous positions. Claimant described the job as one of the lightest of his employment. (Claimant's testimony; DEE, p. 1)

On May 14, 2012, Mr. Ostby opined claimant had achieved maximum medical improvement (MMI). Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Mr. Ostby opined claimant fell within DRE Lumbar Category II, warranting a permanent impairment rating of 8 percent whole person. Mr. Ostby imposed permanent restrictions of: no repetitive bending, stooping, or squatting; no lifting floor-to-waist greater than 10 pounds; and no lifting waist-to-shoulder greater than 10 pounds. (DEC, p. 1)

Claimant testified his secondary operator position fell within Mr. Ostby's restrictions and he was comfortable performing the work. (Claimant's testimony)

At the referral of claimant's counsel, claimant presented to board certified orthopedist, Theron Jameson, D.O., for an independent medical examination (IME) on March 9, 2013. (CE5, p. 3) Dr. Jameson reviewed and summarized claimant's medical records. (DED, pp. 1-3) Claimant described his symptoms for Dr. Jameson and underwent a physical examination. (DED, pp. 4-5) Thereafter, Dr. Jameson assessed disc osteophyte complex at L5-S1 causing lumbar radiculopathy and low back pain. Utilizing the AMA Guides, Fifth Edition, Dr. Jameson opined claimant fell within DRE Lumbar Category III, warranting a permanent impairment rating of 13 percent whole person. Dr. Jameson recommended permanent restrictions of: no repetitive bending or twisting at the waist; and no pushing, pulling, or lifting greater than 25 pounds. Additionally, Dr. Jameson recommended surgical evaluation. (DED, p. 5)

Defendants authorized John Dooley, M.D., of Pain Centers of Iowa (PCI) to provide pain management relative to claimant's low back condition. Claimant began treating with Dr. Dooley in 2012. He typically saw Dr. Dooley at three-month intervals. (Claimant's testimony)

In May 2013, Dr. Dooley reviewed the ratings opined by Mr. Ostby and Dr. Jameson. Dr. Dooley indicated he had been providing claimant pain management in hopes of reducing his low back pain. He opined claimant likely sustained a small level of impairment for pain under the AMA Guides, Sixth Edition. (CE1, p. 1)

Claimant followed up with Dr. Dooley on October 28, 2013. Dr. Dooley noted complaints of low back pain, located in the midline low back and bilateral paralumbar areas. (JE1, p. 1) He noted a history of chronic low back pain with intermittent leg radiation. Claimant reported suffering with a lot of breakthrough pain on hydrocodone 7.5/325 twice per day. Claimant indicated he did not wish to consider a spinal cord

stimulator trial. Dr. Dooley liberalized claimant's hydrocodone dose to 10/325 twice per day. (JE1, p. 2)

The parties entered into an agreement for settlement, approved by this agency on May 30, 2014. By the agreement, the parties stipulated claimant sustained an injury arising out of and in the course of his employment with defendant-employer on March 10, 2011. The parties stipulated claimant sustained a 30.5 percent loss of earning capacity as a result of the injury. This stipulation entitled claimant to 152.5 weeks of permanent partial disability benefits, commencing March 10, 2011 and payable at the weekly rate of $403.46. (DEB, p. 1)

At the time of claimant's injury on March 10, 2011, claimant earned $14.30 per hour. At the time of the agreement for settlement, claimant earned $14.95 per hour. (Claimant's testimony; DEG; DEH)

On September 2, 2014, claimant returned to Dr. Dooley. Dr. Dooley noted complaints of low back pain with radiation to the right lateral thigh, right lower leg, and right foot. (JE1, p. 6) Dr. Dooley ordered a new lumbar spine MRI due to claimant's leg complaints. (JE1, p. 9) Claimant continued to use hydrocodone 10/325 twice daily. (JE1, p. 6)

Following the updated lumbar MRI, claimant returned to Dr. Dooley on October 7, 2014. Dr. Dooley opined the MRI results were not markedly changed from prior studies. (JE1, p. 12) He offered claimant a spinal cord stimulator trial, but cautioned claimant he would need to limit his activity to below shoulder-height with his hands. If claimant declined such care, Dr. Dooley would consider claimant to have achieved MMI and would require a functional capacity evaluation to determine his level of impairment. (JE1, p. 14) Claimant remained on hydrocodone 10/325, which he averaged using twice per day. (JE1, pp. 12, 14)

Claimant returned to PCI on November 7, 2014 and was seen by provider, Lisa Prewitt. Claimant remained on hydrocodone 10/325. Ms. Prewitt again offered a spinal cord stimulator trial. Claimant declined, as he would be unable to continue working if he was forced to limit his activity to below shoulder-level. Claimant indicated he would be willing to consider a trial if he received help at work. (JE1, p. 11)

On May 5, 2015, Dr. Dooley added morphine sulfate to claimant's medication regimen. (JE1, p. 15) Claimant testified he was trialed upon doses of 5, 10, and 15 milligrams of morphine sulfate. (Claimant's testimony) Dr. Dooley prescribed morphine sulfate extended release (ER) 15 milligrams, to be taken twice per day in addition to hydrocodone 10/325 twice per day. (JE1, p. 15) Claimant returned to PCI on May 29, 2015 and reported the medication combination was working well and allowing him improved sleep. (JE1, p. 17)

Due to continued complaints, claimant underwent repeat evaluation with Dr. Abernathey on November 2, 2015. Dr. Abernathey opined claimant's September 2014 MRI revealed mild degenerative changes at multiple levels without significant neural compromise. He opined these results were unchanged from a prior 2011 MRI. Due to the passage of time since claimant's last lumbar MRI, Dr. Abernathey opined claimant should consider a repeat MRI. However, he deferred to claimant's treating physician regarding ordering additional studies. Dr. Abernathey opined he did not recommend aggressive neurosurgical management. (JE2, p. 1)

On January 22, 2016, claimant presented to PCI and was seen by provider, Michelle Prisner. Claimant reported low back pain with worsening right leg radiation to his toes. Claimant reported he was almost unable to use his right leg and on occasion, he would drag his right foot. (JE1, p. 18) A repeat lumbar MRI was ordered, as recommended by Dr. Abernathey. Claimant's medication regiment continued to include hydrocodone 10/325 twice per day and morphine sulfate ER 15 mg twice per day. (JE1, pp. 18, 20)

Following the updated lumbar MRI, claimant returned to Ms. Prisner on April 4, 2016. Ms. Prisner noted the MRI revealed worsening lumbar degenerative disc disease. (JE1, p. 21) Claimant's pain medication regimen was continued at existing levels. (JE1, p. 23)

On May 11, 2016, claimant again was evaluated by Dr. Abernathey. Dr. Abernathey opined claimant's updated MRI demonstrated only mild degenerative changes without significant neural compromise. Due to a paucity of clinical and radiographic findings, Dr. Abernathey opined he did not recommend an aggressive neurosurgical stance. (JE2, p. 1)

On April 26, 2017, claimant presented to Ms. Prisner in follow up. Claimant indicated he was interested in pursuing a spinal cord stimulator trial. However, claimant was taking Plavix due to a cardiac procedure and the cardiologist opined claimant would need to continue on Plavix for one year following stent placement. Ms. Prisner noted claimant would need to be off Plavix prior to undergoing stimulator trial and implantation. Claimant reported the medication combination of morphine sulfate and hydrocodone provided assistance with his level of functioning. Ms. Prisner noted "[w]orkman's [sic] comp wants [patient] weaned off opioids." As claimant planned to pursue spinal cord stimulator trial, Ms. Prisner left claimant's medication dosages intact. (JE1, p. 26) Claimant continued to report relief on the combination of morphine sulfate and hydrocodone at follow up visits with Ms. Prisner in June and September 2017. (JE1, pp. 29, 35)

Claimant returned to Dr. Jameson on December 16, 2017 for a second IME. Dr. Jameson reviewed and summarized claimant's medical records. (CE2, pp. 1-8) Dr. Jameson interviewed claimant and discussed his contemporaneous complaints. (CE2, p. 8) He also performed an updated physical examination. Following records review,

interview, and examination, Dr. Jameson opined claimant's permanent impairment rating remained unchanged: 13 percent by the AMA Guides, Fifth Edition, DRE Lumbar Category III. Dr. Jameson altered claimant's recommended permanent restrictions: no pushing, pulling, or lifting over 10 pounds waist-to-chest; no repetitive bending or twisting at the waist; and no lifting waist-to-floor. He also recommended claimant undergo evaluation by a spinal surgeon other than Dr. Abernathey. (CE2, p. 9)

At defendants' request, on December 18, 2017, claimant presented to board certified occupational and environmental medicine physician, R.L. Broghammer, M.D. for an IME. (DEA, pp. 15, 18) Dr. Broghammer authored a report containing his findings and opinions dated December 20, 2017; in his report, Dr. Broghammer noted he was requested to address whether any "new aggravation" of claimant's back had occurred since the 2014 agreement for settlement. (DEA, p. 1) Dr. Broghammer performed a records review and summary of records authored both pre- and post-agreement for settlement. (DEA, pp. 2-11) During interview, claimant complained of constant low back pain; bilateral leg pain, right greater than left; occasional radiation to the right foot; numbness and burning of the left foot; and occasional loss of urine and bowels. Claimant reported a worsening of pain over the last few years. (DEA, p. 12) Dr. Broghammer performed a physical examination. (DEA, p. 14)

Following records review, interview, and examination, Dr. Broghammer diagnosed multilevel lumbar spondylosis and idiopathic chronic low back pain. (DEA, p. 14) In response to inquiry as to whether claimant had suffered any additional percentage of permanent impairment since the agreement for settlement, Dr. Broghammer opined no additional impairment had been sustained. Dr. Broghammer opined claimant's subjective complaints were not any markedly or significantly different than those reflected in claimant's contemporaneous medical records. He opined claimant's symptoms did not appear to have progressed to any appreciable degree. Dr. Broghammer noted claimant had not proceeded to any surgical or injection therapy. He also commented claimant's medication dosage had remained stable, and claimant had not required additional or significant medication changes. Dr. Broghammer opined updated imaging revealed progression of claimant's degenerative condition, but the progression did not represent any additional percentage of permanent impairment. Further, Dr. Broghammer opined the progression was not related to claimant's employment or injury, but to the normal progression of lumbar spondylosis. Dr. Broghammer recommended no new permanent restrictions. (DEA, pp. 14-15)

On December 29, 2017, claimant returned to Ms. Prisner with complaints of pain, leg weakness, and difficulty getting into vehicles. Claimant's prescription pain medications were continued, with a temporary decrease in morphine sulfate due to impending shoulder surgery. (JE1, p. 39)

Claimant underwent right shoulder surgery and subsequently returned to Ms. Prisner on February 23, 2018. At that time, claimant was awaiting the ability to undergo spinal cord stimulator trial. Ms. Prisner issued prescriptions for morphine sulfate ER 15 mg and hydrocodone 10/325. (JE1, p. 42)

Claimant testified his physical condition has changed since entering into the May 2014 agreement for settlement. Claimant testified he suffers with significantly more pain, which travels down his right leg to his foot. At the time of the agreement for settlement, claimant estimated his pain level as 5 or 6 on a 10-point scale. Currently, claimant rated his pain at a level 9 or 10 on a 10-point scale. With pain medication, claimant testified his pain level comes down for approximately two hours and then returns to the heightened level. At the time of the agreement for settlement, claimant testified his right leg pain was intermittent; over the last couple of years, the pain has become constant. At the end of the day, he experiences difficulty walking, drags his foot, and must lift his foot into the vehicle by grabbing and lifting on his pant leg. Claimant testified his wife may need to help him up the stairs into their home. He must place his hand on the wall for support when rising from bed and he must lean against support when dressing, as he is otherwise unable to lift his leg high enough to put on his pants. Claimant testified these symptoms have come on in the last couple of years. He recently ceased use of Plavix and would now be eligible to proceed with a spinal cord stimulator trial. (Claimant's testimony)

At the time of evidentiary hearing, claimant continued to work at defendant-employer in the secondary operator position. His hourly rate of pay had increased to $16.78 per hour. (Claimant's testimony; DEG; DEH) Claimant testified his increased symptoms have impacted his ability to perform his duties. Claimant testified he and his wife are part of a five-person team in the service order area. This team works together daily. Over the past year, claimant testified the other members of the team have helped him more frequently. Other coworkers will perform the heavier tasks or assist claimant with activities. In the event something must be lifted from the floor, a coworker will lift the item onto a higher workstation for claimant. Claimant testified he also takes more frequent breaks, where is he able to walk away from a task if he is experiencing significant pain. Claimant testified his supervisor allows these breaks and informal accommodations, so long as the team completes their assigned task. Without assistance and breaks, claimant testified he would be unable to continue working as a secondary operator for much longer, as his symptoms are progressively worsening. He admitted he does not miss work often and has not informed anyone at the plant that he is unable to work. (Claimant's testimony)

Claimant's wife, Connie Bronstine, testified at evidentiary hearing. She and claimant have been married nearly 40 years and both have worked at defendant-employer for nearly 40 years as well. For the last 4 years, Ms. Bronstine and claimant have worked together with three others in the service order area. Ms. Bronstine testified she has observed changes in claimant's condition since the May 2014 agreement for settlement. She testified claimant stumbles a lot and drags his right leg. She recalled needing to catch him on one occasion when claimant was unable to lift his foot high enough to reach the next stair. Ms. Bronstine testified she began to notice these issues over the last couple years. Over the course of the year prior to hearing, Ms. Bronstine testified she and their coworkers have begun to assist claimant more frequently. She testified claimant's strength and ability to bend have decreased, leading the team to help with lifting or moving items. Additionally, claimant now takes short

walking breaks several times per day. Without the assistance of the team, Ms. Bronstine testified it would be difficult for claimant to complete his job; she doubted claimant would be able to continue. (Ms. Bronstine's testimony)

Ms. Bronstine's testimony was direct and consistent with claimant's testimony and the evidentiary record. Her demeanor was excellent and gave the undersigned no reason to doubt her veracity. Ms. Bronstine is found credible.

Shelly Curren, human resources manager for defendant-employer, testified at evidentiary hearing. Ms. Curren testified the service order area is the only part of the plant which did not function on a production schedule for shipment. The area is responsible for special orders and accordingly, duties and demands vary from day to day. The team works together to fulfill the orders. She agreed the work in this area was slower and lighter than the production floor. Ms. Curren also testified that lifting from floor level was generally not required, but if performed, could be done with assistance from anyone in the team. (Ms. Curren's testimony)

Ms. Curren testified claimant is a good worker, with good attendance. She denied personal knowledge of increased complaints over the preceding years. She testified claimant's supervisor has only positive things to say about claimant's work and defendant-employer has no intention of ending claimant's employment. Ms. Curren testified she is familiar with the majority of production jobs at defendant-employer and admitted that access to those positions would be limited by adoption of restrictions proposed by Dr. Jameson on lifting. She was unaware of any other employee having a zero-pound lifting limit during the course of her 28 years at defendant-employer. (Ms. Curren's testimony)

Ms. Curren's testimony was consistent with the evidentiary record and her demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt her veracity. Ms. Curren is found credible.

Angela Profetta, nurse at defendant-employer, testified at evidentiary hearing. Ms. Profetta testified she oversees the first aid office at defendant-employer. She reviewed records from the first aid office and found no reference to claimant presenting with reports of pain or an inability to work since the May 2014 agreement for settlement. Ms. Profetta testified she understood claimant saw pain management monthly. (Ms. Profetta's testimony)

Ms. Profetta's testimony was consistent with the evidentiary record. Her demeanor at the time of evidentiary hearing was excellent and gave the undersigned no reason to doubt her veracity. Ms. Profetta is found credible.

CONCLUSIONS OF LAW

The first issue for determination is whether there has been a change of condition since the agreement for settlement approved on May 30, 2014, that might entitle claimant to additional permanent disability benefits under a review-reopening.

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).

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 section 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). The Supreme Court held:

> 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. The functional impairment and disability resulting from a scheduled loss is what it is at the time of the award and is not based on any anticipated deterioration of function that might or might not occur in the future. See Iowa Code § 85.34(2); Second Injury Fund v. Bergeson, 526 N.W.2d 543, 548 (Iowa 1995) ("a scheduled injury is evaluated by determining the loss of physiological capacity of the body part"). Likewise, in 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 claimant's 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).

Claimant argues he suffered a physical change in condition following the agreement for settlement approved on May 30, 2014 and this worsening had led to further loss of earning capacity. Accordingly, it is necessary to compare claimant's physical condition at the time of the agreement for settlement and at the time of evidentiary hearing.

Prior to the agreement for settlement, Mr. Ostby and Dr. Jameson opined claimant suffered permanent impairment. Mr. Ostby opined claimant fell within DRE Lumbar Category II, warranting a permanent impairment rating of 8 percent whole person. Dr. Jameson opined claimant fell within the higher impairment category, DRE Lumbar Category III, warranting a permanent impairment rating of 13 percent whole person. Following the agreement for settlement, Dr. Jameson opined claimant continued to fall within DRE Lumbar Category III, warranting the same 13 percent whole person impairment. Dr. Broghammer opined no additional impairment had been sustained related to the work injury. I therefore find claimant's ratable level of functional permanent impairment has not changed post-agreement for settlement.

Claimant testified he has suffered with an increase in his overall pain since the date of the agreement for settlement. Specifically, claimant testified he experienced level 5 to 6 pain at the time of the agreement for settlement, as opposed to level 9 to 10 at the time of evidentiary hearing. Claimant complained of low back pain at the time of the agreement for settlement and at evidentiary hearing. The significant source of claimant's pain at the time of evidentiary hearing was his right lower extremity.

Claimant's physical symptoms in his right lower extremity have worsened since the agreement for settlement.

At the time of the agreement for settlement, claimant testified he suffered with intermittent right leg pain which would come and go. This testimony is supported by review of claimant's contemporaneous medical records. Following the agreement for settlement, claimant testified his right leg pain increased and became constant. As a result, claimant now experiences difficulties with walking, transitions, balancing, and lifting his leg. Claimant's symptoms are so significant he drags his right foot at the end of a work day. Both claimant and Ms. Bronstine testified to these difficulties and further, that claimant's leg pain and increased symptoms began following the agreement for settlement.

Claimant's medical records post-agreement for settlement identify increased pain and right lower extremity symptoms, with increased dosages of pain medication post-agreement for settlement. At the time of the agreement for settlement, claimant utilized hydrocodone 10/325 twice daily. In May 2015, Dr. Dooley added morphine sulfate ER to claimant's existing hydrocodone dosage. At the time of evidentiary hearing, claimant continued to utilize hydrocodone 10/325 and morphine sulfate ER 15 milligrams, both twice daily. This addition of morphine sulfate represents a significant change in claimant's pain medication levels and supports a determination claimant's physical condition has worsened notably since the agreement for settlement. Furthermore, the frequency in claimant's pain management appointments has changed from once every three months at the time of agreement for settlement to once monthly at the time of hearing. The frequency with which such appointments are required is further evidence of a worsening of claimant's physical condition.

Claimant possessed permanent restrictions imposed by Mr. Ostby at the time of the agreement for settlement. Mr. Ostby imposed permanent restrictions of: no repetitive bending, stooping, or squatting; no lifting floor-to-waist greater than 10 pounds; and no lifting waist-to-shoulder greater than 10 pounds. Dr. Jameson also recommended restrictions pre-agreement for settlement: no repetitive bending or twisting at the waist; and no pushing, pulling, or lifting greater than 25 pounds. Following the agreement for settlement, Dr. Jameson recommended restrictions of: no pushing, pulling, or lifting over 10 pounds waist-to-chest; no repetitive bending or twisting at the waist; and no lifting waist-to-floor. Dr. Jameson's recommended restrictions post-agreement for settlement are slightly more restrictive than those imposed by Mr. Ostby pre-agreement for settlement. Not only are the restrictions more limiting than those authored by Mr. Ostby, the restrictions are considerably more limiting than those previously recommended by Dr. Jameson. Comparing Dr. Jameson's restrictions pre- and post-agreement for settlement supports a determination that claimant is considerably more limited currently than he had been at the time of the agreement for settlement.

Dr. Broghammer is the only other provider to offer an opinion with regard to claimant's need for increased permanent restrictions post-agreement for settlement. Dr.

Broghammer recommended no new permanent restrictions. I find Dr. Broghammer did not possess an accurate understanding of claimant's physical complaints and symptoms and accordingly, reject Dr. Broghammer's opinion on claimant's need for additional permanent restrictions. Dr. Broghammer opined claimant's subjective complaints were not markedly or significant different than those reflected in claimant's medical records. I disagree. Claimant's right lower extremity symptoms have now become constant and more severe, resulting in decreased functionality in tasks requiring walking, balancing, and lifting his leg. Claimant now drags his right foot and must lift upon his pant leg in order to lift his right foot into a vehicle at the end of a work day. Pre-agreement for settlement, claimant suffered with intermittent leg pain which was less severe on the pain scale. I disagree with Dr. Broghammer's position that claimant's symptoms had not progressed to any appreciable degree. I also reject Dr. Broghammer's contention that claimant's medication dosage had remained stable, without additional or significant medication changes. As set forth *supra*, post-agreement for settlement, morphine sulfate was added to claimant's medication regimen. This medication addition is significant. Overall, I find Dr. Broghammer's opinions inconsistent with claimant's medical records and the credible testimony of claimant and Ms. Bronstine. Accordingly, I reject Dr. Broghammer's opinions.

Claimant continues to work in the position he held at the time of the agreement for settlement: secondary operator in the service order area at defendant-employer. Claimant admits the position falls within his permanent restrictions and he is not personally required to perform any lifting from floor level. However, both claimant and Ms. Bronstine testified claimant had recently required more assistance with his duties than at the time of the agreement for settlement. In addition, claimant now takes more frequent breaks, leaving his work station to walk several times per day. Both claimant and Ms. Bronstine testified their supervisor is accommodating of claimant's needs, as the focus is upon the team completing the assigned work. Without the assistance of coworkers and the opportunity to walk, both claimant and Ms. Bronstine doubted claimant's ability to continue working as a secondary operator. Claimant's inability to perform the same duties as he performed at the time of the agreement for settlement supports a finding that claimant has sustained a physical change in his condition since the agreement for settlement.

Given consideration of claimant's pain levels, decreased functionality, increased medication use, more stringent restrictions, and the physical situs of his complaints, I find claimant has suffered a physical change in his condition since the agreement for settlement of May 30, 2014 which negatively impacts claimant's earning capacity.

The next issue for determination is the extent of claimant's industrial disability. The final issue for determination is the commencement date for awarded permanent disability benefits. These issues will be addressed together.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. 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).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant was 61 years of age on the date of evidentiary hearing. He did not graduate high school and was unable to pass the requisite tests to obtain his GED. He did obtain a welding certification. Claimant's work history consists of production work and welding. He has spent the last 40 years as an employee of defendant-employer. He has worked multiple positions, each of which he described as physical in nature. Claimant's employment with defendant-employer is that which best-suits his interests, abilities, and aptitudes.

As a result of the work injury of March 10, 2011, claimant labors under permanent restrictions which preclude his employment in a sizable percentage of production positions at defendant-employer. Claimant was able to bid into a lighter-natured position as a secondary operator. Claimant's duties as a secondary operator fall within the restrictions set forth by Mr. Ostby and Dr. Jameson. Claimant's hourly rate of pay in this position at the time of evidentiary hearing was nearly $2.50 higher than at the time of his injury and $1.83 higher than at the time of the agreement for settlement. Although claimant is capable of performing his duties within applicable restrictions, claimant receives informal accommodations by way of assistance from coworkers and more frequent breaks. Without these informal accommodations, claimant's ability to continue working in the secondary operator position is questionable.

Claimant has received permanent functional impairment ratings of 8 percent and 13 percent whole person, utilizing the diagnosis-related estimates method outlined in the AMA Guides. Despite worsening physical symptoms, particularly of his right leg, claimant continues to work full time at defendant-employer, without lost time. By bidding into the secondary operator position, claimant lost the opportunity for more than sporadic overtime hours; this fact was known at the time claimant entered into the agreement for settlement. Claimant is a dedicated employee who continues to be motivated to work and defendant-employer has maintained claimant's employment for over seven years following his injury, albeit with some informal accommodation.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 40 percent industrial disability as a result of the stipulated work-related injury of March 10, 2011. Such an award entitles claimant to 200 weeks of permanent partial disability benefits (40 percent x 500 weeks = 200 weeks). Pursuant to the agreement for settlement approved May 30, 2014, defendants are entitled to a credit for 152.5 weeks of permanent partial disability benefits, representing the stipulated 30.5 percent loss of earning capacity. Accordingly, defendants shall pay unto claimant 47.5 weeks (200 weeks - 152.5 weeks = 47.5 weeks) of permanent partial disability benefits. Such benefits commence on February 2, 2017, the date claimant filed his review-reopening petition, and shall be paid at the applicable weekly rate of $403.46.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay unto claimant forty-seven point five (47.5) weeks of permanent partial disability benefits commencing February 2, 2017 at the weekly rate of four hundred three and 46/100 dollars ($403.46).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants 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 file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants pursuant to 876 IAC 4.33.

Signed and filed this 31st day of January, 2019.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.