BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN THOMPSON,

Claimant,

vs.

KEOKUK STEEL CASTINGS,

Employer,

and

AMERICAN HOME ASSURANCE,

Insurance Carrier,
Defendants.

File No. 5033079

REVIEW-REOPENING

DECISION

Head Note No.: 2905

STATEMENT OF THE CASE

Claimant, John Thompson, filed a petition in review-reopening seeking workers' compensation benefits from Keokuk Steel Castings, employer, and American Home Assurance, insurance carrier, both as defendants, as a result of a stipulated injury sustained on June 16, 2008. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on April 7, 2017, in Des Moines, Iowa. Prior to hearing, defendant American Home Assurance filed a petition for contribution pursuant to Iowa Code section 85.21 against Liberty Mutual Insurance. The petition for contribution was not considered at the time of evidentiary hearing and Liberty Mutual Insurance elected not to participate in the review-reopening hearing.

The record in this case consists of Joint Exhibits 1 through 14 and the testimony of the claimant. The parties submitted post-hearing briefs, the matter being fully submitted on June 12, 2017.

ISSUES

The parties submitted the following issues for determination:

1. Whether there has been a change of condition since the original arbitration hearing on November 2, 2011, that might entitle claimant to additional permanent disability benefits under a review-reopening; and

2. If a change of condition is established, the extent of claimant's industrial disability.

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening 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:

The underlying arbitration matter proceeded to hearing on November 2, 2011 and the presiding deputy commissioner issued a proposed decision on February 22, 2012. By that decision, the deputy determined claimant sustained work-related cumulative injuries to his bilateral shoulders and left elbow, with a date of injury of June 16, 2008. The deputy noted claimant had undergone four surgeries as a result of the injury: two on the left shoulder, one on the right shoulder, and one on the left elbow. Surgical intervention began in 2009, with each shoulder undergoing repair of SLAP lesions, bursectomy, subacromial decompression, and resection of the distal clavicles. In 2010, claimant underwent a left shoulder Mumford procedure. Also in 2010, claimant underwent a left lateral epicondylectomy with fasciotomy, medial release with epicondylectomy, and neurolysis of the ulnar nerve.

The deputy noted claimant had received impairment ratings from two orthopedic physicians. Treating physician, Mitchell Paul, D.O., opined claimant sustained permanent impairments of 10 percent whole person for the right shoulder, 10 percent whole person for the left shoulder, and 12 percent whole person for the left elbow. Dr. Paul imposed a restriction of overtime as tolerated. Claimant's independent medical examination (IME) physician, Theron Jameson, D.O., opined claimant sustained permanent impairments of 9 percent whole person for the right shoulder, 11 percent whole person for the left shoulder, and 12 percent whole person for the left elbow. Claimant underwent a valid functional capacity evaluation (FCE), which demonstrated claimant was capable of heavy to very heavy work, but should avoid repetitive resisted elbow flexion/extension on a regular basis. At the time of hearing, claimant remained employed at defendant-employer, albeit in a bid position with a lower rate of pay. After consideration of the above and all other relevant factors, the deputy determined claimant sustained a 25 percent industrial disability as a result of the work injury of June 16, 2008. Such an award entitled claimant to 125 weeks of permanent partial disability benefits at the weekly rate of $540.89.

Appeal was taken of the proposed decision. On April 8, 2013, the commissioner's delegee issued final agency action, affirming the proposed arbitration decision. No further review was taken. (Agency file)

On March 4, 2016, claimant filed a review-reopening petition, seeking additional permanent disability benefits arising from the June 16, 2008 work injury. The review-reopening proceeded to hearing before the undersigned on April 7, 2017.

Claimant's testimony was clear and consistent as compared to the evidentiary record and his deposition testimony. 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 began work at defendant-employer in 1994. (JE9, page 2) He held various positions, including finish, salvage, lt/blast, mechanic, inspection, WIB, and lift truck. In September 2011, immediately before the arbitration hearing, claimant bid into the position of lift truck driver. (JE9, p. 3; JE12, p. 1) Following the arbitration hearing, claimant continued to work at defendant-employer. (See JE12, p. 1; JE13) Claimant testified at that time, he held an inspector position. Over time, business at defendant-employer's plant dwindled and resulted in numerous reductions in force. Due to claimant's seniority, he was able to bump into multiple positions, allowing him to remain employed at defendant-employer. He moved between multiple positions, including, inspection, lift truck, finish and salvage. Claimant quantified the severity of such work, from least demanding to most demanding, as: lift truck, inspection, salvage, and finish. The final position claimant held was as salvage. (Claimant's testimony; JE8, Deposition Transcript pp. 21-23; see also JE9, p. 3; JE12, p. 1) Claimant testified he was capable of performing each of these positions. (JE8, Depo. Tr. pp. 32-33) Ultimately, defendant-employer's plant closed. (Claimant's testimony) Claimant's last date of employment at defendant-employer was March 11, 2016. (JE13, p. 71)

Following hearing, claimant continued to follow up periodically with personal physician, J. Beckert, D.O. Dr. Beckert issued claimant prescriptions for hydrocodone for pain relief. From late-2011 through mid-2012, Dr. Beckert prescribed hydrocodone-acetaminophen 5/500, 60 pills. In mid-2012, Dr. Beckert began prescribing claimant 120 pills at a time. During these periods, claimant followed up at two to three month intervals. (JE2, pp. 1, 9-10) Claimant continued to follow up with Dr. Beckert at approximate three-month intervals throughout 2013, continually receiving prescriptions for 120 pills of hydrocodone-acetaminophen 5/500. (JE2, pp. 12-13, 23-25) In January 2014, Dr. Beckert changed the dosage of claimant's hydrocodone-acetaminophen to 5/325; prescriptions continued to be for 120 pills. (JE2, p. 25) Thereafter, claimant continued following up with Dr. Beckert every two to three months through early 2016 and received prescriptions for 120 pills of hydrocodone-acetaminophen 5/325. (JE2, pp. 25-27, 29-31, 33-34, 36-37, 39) Dr. Beckert's notes reference claimant suffered with chronic pain and on multiple occasions, identified complaints of neck and back pain. (JE2, pp. 26-27, 29, 33, 36-37, 39) Claimant

testified he had not experienced back pain for some time and when he did, such instances were limited in duration. (Claimant's testimony; JE8, Depo. Tr. p. 30)

Over time, claimant testified his physical pain worsened after the arbitration hearing. At the time of arbitration hearing, claimant testified he utilized hydrocodone once daily during the work week, but did not utilize medication on the weekend. Claimant testified his pain worsened progressively thereafter, leading him to take two hydrocodone each day, despite no longer working. As a result of pain, claimant believes he is more limited in his activities. Claimant testified any personal health conditions do not cause him ongoing pain and relates his ongoing pain to his bilateral shoulders and arms. (Claimant's testimony; JE8, Depo. Tr. pp. 47, 49)

Following plant closure, claimant performed a job search and ultimately opted to return to college with use of NAFTA-TAA benefits. Claimant promptly enrolled in courses at Central Methodist University, pursuing a bachelors' degree in business administration. He anticipates graduating with such a degree in May 2018. In his first full semester, claimant earned straight-As. He was 58 years of age at the time of hearing. His permanent residence is in Wyaconda, Missouri. (Claimant's testimony; JE8, Depo. Tr. pp. 3-4)

At the referral of claimant's counsel, on January 21, 2017, claimant returned to Dr. Jameson for an updated IME. Dr. Jameson reviewed claimant's medical records and interviewed claimant. (JE7, pp. 3-4) Dr. Jameson authored an updated history, noting claimant had been out of work since the plant closure in March 2016 and had enrolled in college courses for a degree in business administration. Claimant expressed complaints of continued numbness and tingling in the median nerve distribution of the left hand, with pain radiating into the left shoulder; as well as sensitivity about the medial aspect of the left elbow. Dr. Jameson noted claimant had undergone no additional surgeries since Dr. Jameson's prior IME. (JE7, p. 4) Dr. Jameson performed a physical examination. (JE7, pp. 4-5)

Following records review, interview, and examination, Dr. Jameson offered opinions with respect to the extent of claimant's permanent impairment. With respect to the right shoulder, Dr. Jameson opined claimant sustained permanent impairments of 7 percent right upper extremity for range of motion decrements and 10 percent right upper extremity for distal clavicle resection. In total, he found claimant sustained permanent impairment of 17 percent right upper extremity or 10 percent whole person due to the right shoulder condition. With respect to the left shoulder, Dr. Jameson opined claimant sustained permanent impairments of 3 percent left upper extremity for range of motion decrements and 10 percent left upper extremity for distal clavicle resection. In total, he found claimant sustained permanent impairment of 13 percent left upper extremity or 8 percent whole person due to the left shoulder condition. (JE7, p. 5) With respect to the left elbow, Dr. Jameson opined claimant sustained permanent impairment of 12 percent whole person for ulnar neuritis. Dr. Jameson also opined claimant sustained permanent impairment of 3 percent left upper extremity or 2 percent whole person as a result of carpal tunnel syndrome. Finally, Dr. Jameson

recommended permanent restrictions of no pushing, pulling, or lifting greater than 30 pounds with the bilateral upper extremities, and no lifting above chest level of greater than 10 pounds with the bilateral upper extremities. (JE7, p. 6)

Review of Dr. Jameson's prior IME of August 11, 2011 allows for comparison of Dr. Jameson's opinions issued before and after the original arbitration hearing. Following the August 2011 IME, Dr. Jameson opined claimant sustained permanent impairments of 5 percent right upper extremity for range of motion decrements and 10 percent right upper extremity for distal clavicle resection. In total, he found claimant sustained permanent impairment of 15 percent right upper extremity or 9 percent whole person due to the right shoulder condition. With respect to the left shoulder, Dr. Jameson opined claimant sustained permanent impairments of 8 percent left upper extremity for range of motion decrements and 10 percent left upper extremity for distal clavicle resection. In total, he found claimant sustained permanent impairment of 18 percent left upper extremity or 11 percent whole person due to the left shoulder condition. With respect to the left elbow, Dr. Jameson opined claimant sustained permanent impairment of 20 percent left upper extremity or 12 percent whole person for ulnar neuritis. Dr. Jameson also opined claimant sustained permanent impairment of 3 percent left upper extremity as a result of carpal tunnel syndrome. (JE6, pp. 4-5) Dr. Jameson's report is silent regarding recommended permanent restrictions.

On both occasions, the 2011 IME and 2017 IME, Dr. Jameson issued permanent impairment ratings with respect to left carpal tunnel syndrome. The condition of carpal tunnel syndrome was not pleaded at the arbitration or review-reopening level as an element of claimant's June 16, 2008 work injury.

CONCLUSIONS OF LAW

The first issue for determination is whether there has been a change of condition since the original arbitration hearing on November 2, 2011, that might entitle claimant to additional permanent partial disability 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 Rule of Appellate Procedure 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 claimants [*sic*] physical capacity).

> Therefore, we have held that awards may be adjusted by the commissioner pursuant to section 86.14(2) [then section 86.34] when a temporary disability later develops into a permanent disability, see Rose v. John Deere Ottumwa Works, 247 Iowa 900, 906, 76 N.W.2d 756, 759 (1956), or when critical facts existed but were unknown and could not have been discovered by the exercise of reasonable diligence at the time of the prior settlement or award, see Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968). We have also previously approved a review-reopening where an injury to a scheduled member later caused an industrial disability. See Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 13, 17 (Iowa 1993) ("[A] psychological condition caused or aggravated by a scheduled injury is to be compensated as an unscheduled injury.").
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> 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,
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> > 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."
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> 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 of condition after the arbitration hearing of November 2, 2011. Specifically, claimant argues his pain increased, resulting in more frequent use of hydrocodone and increased physical limitations, as evidenced by Dr. Jameson's recommended restrictions. Defendants argue no change of physical condition occurred, as evidenced by claimant's continued employment, including in more physically strenuous positions at defendant-employer. Defendants also note Dr. Jameson's overall impairment rating decreased in 2017 as compared to 2011.

Claimant credibly testified his pain levels worsened following the arbitration hearing in November 2011. Review of Dr. Beckert's medical notes indicates claimant received continued prescriptions for hydrocodone-acetaminophen. The documents also reveal claimant's pill allotment was increased from 60 to 120 pills per prescription, despite consistent prescribing periods. While claimant's prescription dosage changed from hydrocodone-acetaminophen 5/500 to hydrocodone-acetaminophen 5/325, the frequency with which he utilized such medication increased, offsetting the decrease in acetaminophen. However, Dr. Beckert's records identify several sources of pain, including chronic pain generally, as well as back and neck pain. Generally lacking from his records are repeated references to bilateral shoulder or left elbow pain. On these facts, I cannot rely upon the increased frequency of use of medication as strong evidence of a change of physical condition.

Claimant has offered Dr. Jameson's 2017 IME report as evidence of a change in physical condition. Review of the specific ratings performed by Dr. Jameson in 2011 and 2017 reveal claimant's right shoulder range of motion decreased, resulting in ratings of 5 and 7 percent right upper extremity, respectively. However, over the same period, claimant's left shoulder range of motion increased, resulting in ratings of 8 and 3 percent left upper extremity, respectively. The remainder of Dr. Jameson's ratings remained unchanged. On this basis, it appears claimant's physical condition has improved overall since the arbitration hearing. Dr. Jameson recommended permanent restrictions in 2017; however, it is unclear upon which conditions these restrictions are based, as Dr. Jameson also opined claimant sustained permanent impairment relative to an unclaimed carpal tunnel claim. Given claimant's continued employment in more physically demanding positions and the minor changes in claimant's range of motion, I am unable to award Dr. Jameson's restrictions significant weight to form the basis of a physical change of condition.

It is determined claimant has failed to prove by a preponderance of the evidence that he suffered a physical change of condition since the arbitration hearing on

November 2, 2011, that might entitle claimant to additional permanent disability benefits under a review-reopening.

Claimant also argues he suffered an economic change of condition after the arbitration hearing of November 2, 2011. Specifically, claimant highlights the closure of defendant-employer's plant in March 2016.

The Iowa Supreme Court denied a review-reopening in a case involving a claimant whose physical condition remained unchanged and her earning capacity decreased solely because of factors outside of the award, including downsizing by the employer. U.S. West v. Overholser, 566 N.W.2d 873 (Iowa 1997). Where an employee's change in economic circumstances is caused by factors other than the original injury, such as downsizing by the employer, the employee is not entitled to increased benefits in a review-reopening proceeding. See Bright v. SuperValue, Inc., No 7-100/06-0753, (Ct. of App. April 11, 2007).

Given this precedent, it is determined claimant has failed to prove by a preponderance of the evidence that he suffered an economic change of condition since the arbitration hearing on November 2, 2011, that might entitle claimant to additional permanent disability benefits under a review-reopening.

Having determined claimant failed to carry his burden of establishing a change of condition since the arbitration hearing on November 2, 2011, consideration of the extent of claimant's earning capacity is moot. As defendant prevailed in this matter, the costs of the proceeding shall be borne by claimant.

ORDER

THEREFORE, IT IS ORDERED:

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

Claimant shall take nothing from these proceedings.

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

Costs are taxed to claimant pursuant to 876 IAC 4.33.

Signed and filed this 14th day of March, 2018.

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.