BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAY GRAY, Claimant, vs. FRONTIER COMMUNICATIONS, Employer, and CNA INSURANCE, Insurance Carrier, Defendants.	File Nos. 5038148, 5038595 REVIEW – REOPENING DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Jay Gray filed two petitions for review-reopening seeking workers' compensation benefits from Frontier Communications, and CNA Insurance.

The matter came on for hearing on December 5, 2017, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Sioux City, Iowa. The record in the case consists of Joint Exhibits 1 and 2; Claimant's Exhibit 1; and Defendants' Exhibits A through F; as well the sworn testimony of claimant, Jay Gray.

Nancy Jones was appointed the official reporter for this hearing. The parties argued this case and it was fully submitted on December 12, 2017.

SUMMARY OF ISSUES AND STIPULATIONS

Prior to the commencement of hearing, the parties submitted a Hearing Report and Order which contained a number of stipulations. These stipulations have been accepted by the undersigned. The stipulations contained in that Hearing Report and Order are binding and enforceable at this time. The only issue submitted for agency determination is the nature and extent of claimant's industrial disability upon review-reopening. All other matters are stipulated.

FINDINGS OF FACT

Jay Gray was born in July 1975, making him 42 years old as of the date of the

review-reopening decision. He is married with two minor children.

Mr. Gray testified live and under oath at hearing. He is a highly credible witness. His testimony is consistent with his past testimony, as well as the remainder of the record. There was nothing about his demeanor which caused the undersigned any concern about his truthfulness. He did not appear prone to exaggeration whatsoever.

A snapshot of the claimant's condition was taken in an arbitration hearing dated September 11, 2012. As a result of that hearing Deputy James Christenson issued an arbitration decision on October 15, 2012, awarding the claimant benefits on two files. Deputy Christenson entered the following relevant findings of fact.

> Claimant began working for Frontier in September 2006. Claimant works as a sales and service technician. Claimant's job duties include, but are not limited to, repair and locating cable, troubleshooting, and maintenance of Frontier's equipment. The job requires claimant to be able to lift up to 70 pounds, and to stand, sit, climb, bend and stoop for extended periods of time. (Exhibit 7) Claimant said his job required him to climb a ladder and walk on uneven ground.
>
> On August 25, 2010, claimant was locating cable when he slipped while working on a steep grade. Claimant landed on his buttocks. He completed his locating job. Claimant said he felt stiff and sore after his fall.
>
> On August 27, 2010, claimant was evaluated at Indian Hills Clinic (Indian Hills) with complaints of lower back pain radiating into the left leg. Claimant was told to take over-the-counter medication for pain. (Ex. 1, pages 1-2)
>
> Claimant returned to Indian Hills in September 2010. Claimant complained of continued lower back pain. Claimant was recommended to have an MRI. (Ex. 1, pp. 7-8)
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> An MRI taken on September 15, 2010, showed a disc extrusion at the L5-S1 levels. (Ex. 2)
>
> In September 2010, claimant was evaluated at CNOS by Matthew Johnson, M.D. Claimant was assessed as having a left-sided L5-S1 disc herniation. Surgery was discussed as a treatment option.
>
> On October 5, 2010, claimant underwent a left L5-S1 microdiskectomy, performed by Dr. Johnson. (Ex. 4)
>
> Claimant testified he wanted to return to work quickly. He said that based on his request, Dr. Johnson released him to return to work at full duty on November 24, 2010. (Ex. 3, p. 3)

In a December 6, 2010, letter, Dr. Johnson found claimant had a ten percent permanent impairment to the body as a whole regarding his August 25, 2010, injury. He found claimant at maximum medical improvement (MMI) on November 24, 2010. (Ex. 3, p. 4)

On December 6, 2010, claimant had returned to work for approximately one week. Claimant said he was digging in the snow when he felt a pull in his lower back.

On January 7, 2011, claimant returned to Dr. Johnson with lower back pain radiating through the thigh. Claimant was assessed as having a possible recurrent disc herniation with radiculopathy. He was returned to full duty. (Ex. 3, p. 5; Ex. A, p. 3)

Claimant underwent a second MRI. It showed a recurrent disc herniation on the left at the L5-S1 level. In February 2011, claimant returned in follow-up with Dr. Johnson. A second microdiskectomy surgery was discussed as an option for treatment. Claimant was told that if the second surgery was not successful, he would probably require a fusion. (Ex. 3, pp. 6-7)

Claimant underwent a second microdiskectomy at the L5-S1 level on February 22, 2011, performed by Dr. Johnson. (Ex. 5)

Claimant underwent physical therapy in March 2011. A March 16, 2011, physical therapy report indicated claimant had diminished sensation down his left lower extremity. Claimant also indicated difficulty with his leg had increased following the second surgery. (Ex. 3, pp. 10-18)

In April 2011, claimant returned in follow-up with Dr. Johnson. Claimant had continued lower back pain. Claimant also complained of continuous numbness and tingling in the left leg that increased with activity. Claimant wanted to return to work, but Dr. Johnson recommended against it. (Ex. 3, p. 19)

An MRI of the lumbar spine revealed claimant had scarring around the site of the surgery, related to the surgery. Claimant had continued numbness in his left leg that worsened with walking. He was returned to work. (Ex. 3, pp. 21-24)

Claimant returned in follow-up with Dr. Johnson on May 25, 2011. He had numbness and tingling in his left leg. He also had lower back pain when standing for an extended period of time. Claimant had difficulty sleeping due to lower back pain. He was found to be at maximum medical improvement (MMI). He was returned to work at full duty. (Ex. 3, p. 25)

Claimant said he needed to return to work at full duty as he needed the income to support his family. Claimant said his continued employment with Frontier was very important to him. He said his job at Frontier was the best job he had ever had.

In a June 6, 2011, note, Dr. Johnson found claimant had a 13 percent permanent impairment to the body as a whole. (Ex. 3, p. 26)

In a September 27, 2011, report, Douglas Martin, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant indicated if he walked for long distances or bent over, he had leg cramping. Claimant had persistent left foot numbness. He had measurable atrophy on the left calf. Dr. Martin found claimant had an 18 percent permanent impairment to the body as a whole. He did not assign claimant any permanent restrictions. (Ex. 6)

Claimant testified he still has left leg numbness aggravated by walking. He said approximately three-quarters of his left foot is numb. He said his foot numbness makes it difficult for him to walk on the job, and he has difficulty with walking on uneven ground. He said repetitive bending at work aggravates his back and causes his back muscles to spasm. He said he is able to get help from co-workers to do his job. He said that since his injuries, he requires greater help from co-workers than he did before his injuries. Claimant said if he did not have help from co-workers, he could still perform his job, but it would be very difficult. Claimant testified his supervisors have accommodated his limitations.

Claimant testified he takes three prescription medications for pain. He said he has difficulty sleeping due to pain.

At the time of hearing, claimant earned $29.07 per hour.

(Defendants' Exhibit A, pages 2-4)

Based upon these findings of fact, the Deputy reached the following conclusions of law.

Regarding his first injury of August 25, 2010, claimant underwent a microdiskectomy at the L5-S1 levels by Dr. Johnson. Claimant returned to work approximately six to seven weeks after that surgery. Claimant was not given any permanent restrictions following surgery for his August 2010 injury. The records indicate claimant had a substantial improvement in his back pain following surgery. (Ex. 6, p. 2) The only rating given to claimant for his August 2010 injury was the ten percent to the body as a whole, issued by Dr. Johnson. Given this record, it is found that claimant has a ten percent loss of earning capacity or industrial disability for the

injury of August 25, 2010. Dr. Johnson found claimant was at MMI on November 24, 2010. Permanent partial disability benefits shall commence on this date. (Ex. 3, p. 4)

Regarding the December 2010 injury, claimant had a second microdiskectomy also performed by Dr. Johnson in February 2011. The records indicate claimant did not recover quickly from the December 2010 injury. In April 2011, approximately two months after surgery, claimant was not allowed to return to work, even though the record indicates claimant wanted to return to work. (Ex. 3, p. 19)

Claimant was allowed to return to work full duty by Dr. Johnson. Even though he was returned to work at full duty, claimant still had pain in the left leg and lower back after prolonged standing. He also had numbness in the foot and difficulty with sleeping at night due to pain. (Ex. 3, p. 25) The record indicates that, after both surgeries, claimant wanted to return to work as soon as possible to support his family. The record suggests that even though claimant has pain and some limitations to his lower back and left lower extremity following his December 2010 injury, he has made a great deal of effort to return to work, even if his work aggravates his symptoms.

Two physicians have given impairment ratings following the December 2010 injury. In a two-sentence letter, from June 2011, Dr. Johnson found claimant had a 13 percent permanent impairment to the body as a whole. It is unclear if this rating refers only to the second injury or to the combined effects of both injuries. Because the note has no detail or analysis, I do not know how Dr. Johnson arrived at the 13 percent figure. (Ex. 3, p. 26)

Dr. Martin evaluated claimant on one occasion for an independent medical evaluation (IME). His report found that claimant had an 18 percent permanent impairment to the body as a whole. Dr. Martin's report is detailed. I am able to understand, from reading the report and using the Guides, how Dr. Martin arrived at his figure of 18 percent functional impairment for claimant. (Ex. 6) Based on this record, it is found that Dr. Martin's report regarding permanent impairment, as it relates to the second injury, is more convincing.

Dr. Martin found that claimant had an 18 percent permanent impairment to the body as a whole. The report does not specifically indicate if the 18 percent permanent impairment relates to both injuries or just the second injury. As Dr. Martin's report refers to causation for both the August 2010 and December 2010 injuries, it is inferred from his report that the 18 percent permanent impairment rating is meant to relate to the combined permanent impairments from both the August 2010 and December 2010 injuries. (Ex. 6, p. 6)

As noted above, Dr. Johnson found claimant had a ten percent permanent impairment to the body as a whole regarding the August 2010 injury. The combined values charts of the Guides, (Fifth Edition), page 604 indicate that a 10 percent rating combined with a 9 percent rating yields an 18 percent permanent impairment to the body as a whole. Using Dr. Martin's functional impairment of 18 percent for both injuries, and taking into consideration Dr. Johnson's 10 percent rating for the August 2010 injury, this results in a finding that claimant has a 9 percent functional impairment regarding his December 2010 injury. For this reason, it is found that claimant has a 9 percent functional impairment regarding his December 2010 injury. Dr. Martin found claimant at MMI on September 27, 2011. Benefits for the second injury shall commence on this date.

Claimant does not have any permanent restrictions regarding his second injury. However, the record indicates that claimant has had to rely on the help of co-workers to perform his job. The record indicates claimant has continued pain in his lower back and left leg, and that his left foot is routinely numb. This makes walking on uneven ground difficult. This condition is also aggravated when claimant has to repetitively bend, walk, or stand. Even though claimant does not have any permanent restrictions, he is obviously physically limited, when compared with his pre-injury status regarding lifting, bending, walking, and standing for extended periods. The claimant's job at Frontier requires that he perform all these tasks. (Ex. 7)

When all relevant factors are considered, it is found that claimant has a 20 percent loss of earning capacity or industrial disability regarding his December 1, 2010, injury. Dr. Martin found claimant at MMI on September 27, 2011. Benefits for the second injury shall commence at this date.

I recognize this decision results in an overlap of payment of permanent partial disability for the August 2010 and December 2011 injuries. In the past, this agency avoided overlapping benefits as they are historically prohibited. However, recent appeal decisions by this agency have held that overlapping is no longer prohibited, and should occur if dictated by law. Summerlin v. Tyson, File Nos. 5025718 and 5025719 (App. May 19, 2011).

I also recognize that the parties indicated in the hearing report that the commencement date for any permanent partial disability benefits should begin on April 28, 2011. My problem with honoring this stipulation, and why an overlap of permanent partial disability benefits is required in this case, is due to Dr. Johnson's rating for the August 2010 injury. Dr. Johnson thought claimant had a ten percent permanent impairment

> regarding his August 2010 injury. He found claimant was at MMI for that injury on November 24, 2010. I cannot ignore that rating or Dr. Johnson's finding of maximum medical improvement. This rating requires that I find claimant is due overlapping periods of permanent partial disability benefits, and that I have to make a finding of fact regarding commencement dates of benefits for both the first and second injury.

(Def. Ex. A, pp. 5-7)

Claimant's Condition Since the September 12, 2012, Arbitration Hearing

Since that hearing, Mr. Gray continued working without restrictions as a line installer for the employer, Frontier Communications. On September 21, 2012, he returned to Matthew Johnson, M.D., for follow up of his low back complaints. (Jt. Ex. 1, p. 1) Dr. Johnson ordered a new MRI which showed "considerably more degenerative change since his previous MRI." (Jt. Ex. 1, p. 4) Mr. Gray attempted to avoid surgery despite Dr. Johnson's recommendation for surgery. He underwent conservative treatment including pain medications and injections between October 2012, and August 2015. (Jt. Ex. 1, pp. 4-11)

In the meantime, Mr. Gray sought and obtained employment with a new employer, Western Iowa Telephone. He began his new job in approximately December 2014. The position was initially a $4.00 per hour pay cut. Mr. Gray testified that the position was easier on his back. Specifically, at Frontier, Mr. Gray had worked as an installer. He testified, consistent with the September 2012, arbitration hearing, that he installed internet for business and home customers. As part of this, he spent a great deal of his time digging up and fixing buried cable. For Western Iowa Telephone, he began as an technician, doing similar work that he had performed at Frontier. Western Iowa Telephone, however, used bucket trucks, so there was no climbing or carrying ladders. Eventually Mr. Gray became a "switch tech," which, while in the same field, is a more technical and skilled position. He manages the telephone switch and network equipment. (Def. Ex. F, Gray Depo., pp. 12-13) He further testified that the cable at Western Iowa was easier to work with.

On September 1, 2015, Dr. Johnson documented the following:

> I saw Jay in followup to discuss MRI results. Has a history of 2 previous lumbar microdiskectomy operations; first of which was in October 2010, the second of which was in February 2011, both at L5-S1 on the left. He had residual symptoms since the surgery, primarily consisting of numbness and tingling in an S1 pattern in the left lower extremity. For the past several months to a year, he has had increasing symptoms in his right lower extremity, including pain that radiates into the posterior thigh and calf, occasionally into the lateral calf on the right as well. His pain is worse with sitting for long periods of time, with bending forward and doing other things that would irritate the L5 and S1 nerve roots.

(Jt. Ex. 1, p. 11) Mr. Gray testified essentially that he had avoided surgery as long as he could, but he realized around this time that he would be unable to avoid further surgery.

On October 19, 2015, Dr. Johnson performed a single level posterolateral fusion at L5-S1. (Jt. Ex. 1, pp. 14-15) A month later Dr. Johnson noted he "did have near complete relief of all symptoms in his left lower extremity in an S1 pattern;" however, the symptoms returned. (Jt. Ex. 1, p. 16) Dr. Johnson performed routine follow up care for the next several months, including being taken off work or work restrictions, follow up diagnostic radiographs, medications and physical therapy. (Jt. Ex. 1, pp. 17-37) In April 2016, Dr. Johnson set an appointment for Mr. Gray in October 2016, and announced his intent to place him at maximum medical improvement. (Jt. Ex. 1, p. 37) He was on a 40-pound lifting restriction at that time, which was accommodated by his new employer.

The following was documented at the October 2016, visit:

> Jay is in today for recheck. He is status post L5-S1 PLIF that was done on October 19, 2015. He is one year out at this time. Overall, he is doing well. He does get some occasional pain and stiffness in the back when standing long periods or bending over for long periods, but overall continues to do well. He denies any really significant radicular pain. He denies any fevers, chills, or night sweats, and bowel or bladder problems.

(Jt. Ex. 1, p. 39) He then released Mr. Gray and prepared an expert opinion report for the insurance carrier, assigning a 20 percent whole person impairment rating. (Jt. Ex. 1, p. 41) I find this report highly credible.

A functional capacity evaluation was performed in April 2017, which placed Mr. Gray in the medium work classification, and placed reasonable restrictions on his lifting and other work activities. (Jt. Ex. 2) In general, he has a 40 to 50-pound lifting restriction, as well as a limitation of no excessive bending. He is able to work in his current position in spite of these restrictions.

Defendants entered claimant's wage documentation including 2012 and 2016 tax returns and W-2s from 2014 and 2015. (Def. Exs. C, D, and E) Mr. Gray had a substantial loss of actual earnings in 2014 and 2015. By 2016, however, his overall earnings had increased slightly.

CONCLUSIONS OF LAW

The only question presented is the nature and extent of claimant's industrial disability upon review-reopening.

In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.14, 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) (2013). In order to demonstrate

eligibility for an increase of compensation under section 86.14(2), the claimant must demonstrate what his/her physical or economic condition was at the time of the original award or settlement. At a subsequent review-reopening hearing, claimant has the burden to prove that there is a substantial difference in such condition which warrants an increase in compensation. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). The difference can be 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). Essentially, two snapshots of the claimant's condition are taken; one in each hearing. The claimant must prove that there is something substantially different between the two snapshots such that it warrants an increase in benefits. Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968).

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. Kohlhaas at, 392. Review-reopening is not intended to provide either party with an opportunity to relitigate issues already decided or to give a party a "second bite at the apple." The agency, however, is forbidden from speculating as to what was contemplated at the time of the original snapshot. Id.

The burden remains upon the injured worker to prove by a preponderance of the evidence that the current condition is proximately caused by the original injury. Kohlhaas, 777 N.W.2d at 392. When a work-related injury causes another injury to the worker, this new injury (sequela) may also be considered as a work-related injury under Iowa's workers' compensation laws.

> When an employee suffers from a compensable injury and another condition or injury arises that is the consequence or result of the previous injury, the sequelae rule applies. If the employee suffers a compensable injury and later suffers further disability, which is the proximate result of the original injury, such further disability is compensable. If the employee suffers a compensable injury and thereafter returns to work and, as a result, the first injury is aggravated and accelerated so that the employee is more greatly disabled than they were before returning to work, the entire disability may be compensable. The employer is liable for all consequences that naturally and proximately flow from the accident.

Oldham v. Scofield & Welch, 222 Iowa 764, 767-68, 266 N.W. 480, (1936).

In this case, there is no question that the standard for review-reopening has been met; the only question is the extent of claimant's industrial disability resulting from a combination of his two work injuries.

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.

Looking at the record as a whole, the greater weight of evidence supports a finding that the claimant has suffered a 40 percent loss of earning capacity as a result of the combination of his work injuries. The main factors supporting this result is the claimant's high impairment rating, his loss of actual earnings, his lengthy recovery period, his medical restrictions and his inability to engage in past employment. I find that the claimant would likely be unable to engage in his past work as an installer. Fortunately, the claimant is quite bright, skilled and well-suited to advance in his chosen industry. He has actually moved into a more skilled position with less physical requirements. This is a result of both his intelligence and skills, as well as his high motivation. None of this changes the fact that, Mr. Gray would have substantial difficulty returning to traditional installer work where he would have to carry ladders and work on uneven surfaces. In the competitive job market, he would have significant difficulties securing new employment in his field.

Mr. Gray underwent a significant fusion surgery in 2015, which resulted in an unusually high impairment rating. Defendants argue, with some merit, that the claimant's income has actually increased overall. I agree that his overall income did increase between 2012 and 2016. He also took a substantial pay decrease to move jobs and had significant lost income (temporarily) between 2014 and 2015, while he was being treated for his condition. Mr. Gray took great efforts to avoid surgery, and this was reasonable. Ultimately, he could not avoid the surgery. All of this points to high motivation, as well as a more severe medical impairment and functional disability.

I find that, at this point, the claimant really suffers from one disability. While there is no doubt he suffered two separate and distinct injuries, upon review-reopening, his industrial disability is not distinguishable between the two injuries. I find that the disability should be assigned to his second injury in December 2010 (File No. 5038595). Nevertheless, defendants are entitled to a full credit for past benefits paid.

The parties have stipulated that benefits should commence on October 14, 2016. (See Hearing Order)

ORDER

THEREFORE IT IS ORDERED:

File No. 5038595:

Defendants shall pay the claimant one hundred (100) weeks of permanent partial disability benefits at the rate of four hundred nineteen and 24/100 dollars ($419.24) per week from October 14, 2016.

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 be given credit for the weeks previously paid on both file numbers.

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.

File No. 5038148

Claimant shall take nothing further.

Signed and filed this 26th day of June, 2018.

JOSEPH L. WALSH
DEPUTY WORKERS'
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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.